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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 123

DIRK DE JONGE, APPELLANT,

vs.

THE STATE OF OREGON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

FILED JUNE 16, 1936.

SUPREME COURT OF THE UNITED STATES

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No. 123

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

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[fols. 1 & 2] [Caption omitted]

[fol. 3] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

DIRK DE JONGE, Appellant,

v.

STATE OF OREGON, Appellee

PETITON FOR APPEAL—Filed April 17, 1936

To the Chief Justice of the Supreme Court of the State of Oregon:

Your petitioner, Dirk De Jonge, respectfuly shows:

Your petitioner is the appellant in the above entitled cause.

That on September 29, 1934, appellant was indicted by the Grand Jury of Multnomah County, State of Oregon, under Section 14-3110 to 3112, Oregon Laws of 1930, as amended by Chapter 459, Oregon Laws of 1933, which said indictment charged that he, on July 27, 1934, in Multnomah County, Oregon, did "unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to-wit, the Communist Party * * * which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage * * *."

Having pleaded not guilty, appellant was brought to trial on the 30th day of October, 1934. At the conclusion of the State's case in chief, appellant moved the trial court for an order directing a verdict of acquittal, on the following grounds, among others:

"That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution * * * and Section 1 of Amendment XIV of the United States Constitution * * *."

"If the evidence introduced by the prosecution be held sufficient to go to the jury upon the portion of the criminal [fol. 4] syndicalism statute under which the defendant is

ere charged, then that portion is a violation of the due rocess clause of the 14th Amendment to the United States onstitution, because it demands that the defendant comply ith a standard of conduct which he could not know in dvance."

To the disallowance of said motions exceptions were aken with reference to each of the grounds set forth.

Thereafter and at the conclusion of the testimony, the ppellant again moved the trial court for a directed verdict, n the following grounds, among others:

"That the Oregon criminal syndicalism law as amended y the 1933 Legislature violates Amendment I of the United tates Constitution and Section 1 of Amendment XIV of he United States Constitution."

In disallowing the said motion for a directed verdict, the ourt said:

"The record may show that the motion for a directed erdict of acquittal is denied, and an exception is allowed to the ruling with reference to each of the specifications et forth."

The jury returned a verdict of guilty and recommended mency, and based thereon the court entered a judgment conviction and sentenced appellant to a term of seven ars in the Oregon State Penitentiary.

From said judgment of conviction appellant appealed to e Supreme Court of Oregon, alleging as reversible errors, ong others, the failure of the trial court to direct a ver- of acquittal and the repugnancy of the Oregon crim- al syndicalism law as amended in 1933 to Section 1 of endment XIV of the United States Constitution, par- ularly as construed to sustain the judgment of convic- n. The Supreme Court considered the questions raised der the Constitution of the United States, stating in its inion:

"The appellant contends that the State criminal syndica- m law as applied in the present instance is violative of 14th Amendment of the said Constitution and of Article, paragraphs 8 and 26, of the Oregon Constitution. Rely- on the case of Fiske v. Kansas, 274 U. S. 380 (71 L. Ed.

1108, 47 S. Ct. 655), it is insisted that the law as applied to [fol. 5] the present case is an arbitrary and unreasonable exercise of the police power of the state and unwarrantably infringes the liberty of the defendant."

Despite these contentions made by appellant and noted for consideration by the court, the court affirmed the judgment of conviction, upholding the Oregon criminal syndicalism law, as amended by the 1933 Legislature and as applied in this instance, not to be in conflict with Section 1 of Amendment XIV of the United States Constiution.

Vol. 21, No. 8, page 317, Advance Sheets, Supreme Court of the State of Oregon.
51P. 2nd 674.

A petition for rehearing was seasonably made, appellant again urging the repugnancy of the Oregon criminal syndicalism law as amended in 1933 and particularly as applied in this instance, to Section 1 of Amendment XIV of the United States Constitution. The motion for rehearing was denied, without written opinion, on January 21, 1936.

Vol. 22, No. 4, Advance Sheets, Supreme Court of the State of Oregon.

The Supreme Court of the State of Oregon is the highest court of said state in which a decision in this cause can be had.

That in said cause there is drawn in question the validity of a statute on the ground that the said statute is repugnant to the Constitution and Laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Section 1 of Amendment XIV of the Constitution of the United States.

That therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the rules of the Supreme Court of the United States, your petitioner respectfully shows this court that this case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237(a) of the Judi- [fol. 6] cial Code, a review could be had in the Supreme Court of the United States on a writ of error as to matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the State Supreme Court, the highest court in said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Oregon may be examined and reversed, and a judgment rendered in favor of said appellant, setting aside his conviction and releasing him from custody, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Oregon under his hand and the seal of said court, be sent to the Supreme Court of the United States, as provided by law, and that an order be made fixing the amount of the bond as security for costs thereon, and for an order approving said bond.

Dated April 17, 1936.

Osmund K. Fraenkel, Attorney for Appellant, 76 Beaver St., New York, N. Y. Gus Solomon, Leo Levenson, Irvin Goodman, of Counsel.

[fol. 7] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 17, 1936

The appellant, Dirk De Jonge, assigns the following errors in the records and proceedings in this cause:

1. The Supreme Court of the State of Oregon erred in affirming the judgment of conviction because said judgment

deprived appellant of his liberty without due process of law, in violation of Section 1 of Amendment XIV of the United States Constitution, in that the Oregon criminal syndicalism law (Sections 14-3110 to 3112, as amended by Chapter 459, Oregon Laws of 1933) violates said Section 1 of Amendment XIV of the United States Constitution.

A motion was made by your petitioner at the conclusion of the state's evidence, and again at the conclusion of all of the testimony, for a directed verdict on said ground, and exceptions were taken to the refusal of the court to grant said motion. The claim of Federal right was considered by both the trial court and the Supreme Court of the state.

2. The Supreme Court of the State of Oregon erred in affirming the judgment of conviction because said judgment deprived appellant of his liberty without due process of law, in violation of Section 1 of Amendment XIV of the United States Constitution, in that the Oregon criminal syndicalism law (Sections 14-3110 to 3112, as amended by Chapter 459, Oregon Laws of 1933), particularly as construed by the Supreme Court of Oregon and as applied in the instant case, violates said Section 1 of Amendment XIV of the United States Constitution.

[fols. 8-20] A motion was made by your petitioner at the conclusion of the state's case in chief, and again at the conclusion of the testimony, to direct a verdict of acquittal on said ground, and exceptions were taken to the refusal of the court to grant said motion. The claim of Federal right was considered by both the trial court and the Supreme Court of the State.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that said judgment of the Supreme Court of the State of Oregon, dated the 21st day of January, 1936, in the above entitled cause, be reversed, and judgment entered in favor of this appellant.

Dated April 17, 1936.

Osmund K. Fraenkel, Attorney for Appellant, 76 Beaver St., New York, N. Y. Gus J. Solomon, Leo Levenson, Irvin Goodman, of Counsel.

[fol. 21] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 20, 1936

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a judgment made and rendered in the above entitled cause by the Supreme Court of the State of Oregon on November 26, 1936, and from the order and judgment made and rendered by said Court on January 21, 1936, denying the petition of said appellant for a rehearing in said cause, and from each and every part of said judgments and orders, and having presented and filed his petition for appeal, assignment of errors and prayer for reversal, and statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is Hereby Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Oregon in the above entitled cause, as provided by law; and,

It is Further Ordered that the Clerk of the Supreme Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within sixty days from this date; and,

It is Further Ordered that security for costs on appeal be fixed in the sum of $250.00.

Dated April 18, 1936.

James U. Campbell, Chief Justice of the Supreme Court of the State of Oregon.

[fols. 22 & 23] Bond on Appeal for $250.00, approved and filed April 18, 1936, omitted in printing.

[fols. 24-27] Citation, in usual form, filed April 18, 1936, omitted in printing.

[fol. 28] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OF FACTS—Filed June 2, 1936

For the purpose of shortening the record on appeal, it is hereby stipulated that the facts involved in the within controversy are as follows:

The defendant, Dirk De Jonge, was, on September 29, 1934, indicted by the grand jury of Multnomah County, Oregon. The charging part of the indictment is as follows:

"The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D., 1934, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to-wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon",

in violation of Section 14-3112, Oregon Code, 1930, as amended by Chapter 459, General Laws of Oregon, 1933. This defendant, who was tried separately at his request, after a trial lasting in excess of three weeks, was found guilty as charged.

On Friday, July 27, 1934, there was held at what was referred to as Unity Center, 68 Southwest Alder Street, Portland, Oregon, a meeting which had been previously advertised by mimeographed handbills issued by the Portland section of the Communist party. The number of people in attendance was variously estimated by some who were present at one hundred and fifty to three hundred. It was estimated by some of the members of the Com-

[fol. 29] munist Party present that not to exceed ten to

fifteen per cent of those in attendance were members of the Communist party. No admission charge was made and no questions were asked of those entering as to whether or not they were members of or in sympathy with the Communist party. The notice of the meeting advertised it as a protest against illegal raids on workers' halls and homes, and to protest against the shooting of striking longshoremen by Portland Police.

At this meeting Edward R. Denny, a member of the Communist party, acted as Chairman, and stated in opening the meeting that it was a meeting held by the Communist party. He introduced the various speakers on the program. The first speaker was Don Cluster, a member of the Young Communist League, who spoke at some length on the activities of the Young Communist League. The defendant, De Jonge, gave the following reasons for his own attendance:

"I went to that meeting because I was instructed by the Section Committee of the Communist party, through its section organizer, comrade Louis Olson, to speak at that meeting in the name of the Communist party."

De Jonge, who admitted that he was, and for several years had been a member of the Communist party, was the second speaker on the program, and in his talk protested against conditions at the county jail, the action of city police in relation to the maritime strike then in progress in Portland, and numerous other matters. As stated in his own language:

"Well, at that meeting, speaking as a Communist, representing the Communist party, I went into a discussion as to why the workers' Book Shop, the Communist party headquarters, the Marine Workers' Industrial Union hall, the Civil Emergency Federation and International Labor Defense halls were raided. * * * I told the workers there, at least, I laid the background for the reasons why these workers' halls and offices were raided. I told the workers that the reason of these attacks upon the working class organizations was a stepping stone on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break that strike by pitting the maritime

longshoremen and seamen against the Communist movement."

There was also testimony to the effect that De Jonge asked everybody present at such meeting to do more work [fol. 30] in getting more members for the Communist party, and requested everyone present to be at the street meeting of the Communist party to be held at Fourth and Alder Streets in Portland, Oregon, the following evening; that he requested those present to bring everyone out, including their friends, to show their defiance to local police authority, and to assist them in their revolutionary tactics. When he finished his speech he received a tremendous ovation from the gathering there. There is also testimony to the effect that Communistic literature was sold at the meeting, among which were "The Young Communist", and "The Daily Worker", and whose purchase defendant urged. As stated in his own language, when asked whether or not he had urged those present to buy Communist papers and literature, the defendant answered:

"I don't remember whether I did or not, but I usually do at meetings held by the Communist party; that is, every Communist is a literature salesman as well as an organizer."

While the meeting was still in progress it was raided by the police. This meeting was described by most of the witnesses as having been conducted in an orderly manner, except that there was a little stir when the police entered. A group of those present, however, had formed a "defense circle" to resist any attack by what they referred to as "vigilantes". They had been warned that there might be an attempt by the "vigilantes" to break up the meeting. De Jonge, as well as several others who were actively conducting the meeting, were then arrested by the police. Upon searching the hall in which the meeting was held, the police found a quantity of Communist literature.

The evidence shows that at the time of the defendant's arrest there were sections, units and fractions of the Communist party existing in Multnomah County, Oregon; that they were selling, distributing and circulating official Communist literature and were furthering their organization and adding new members to the Communist party in Mult-

nomah county; that there was introduced into evidence [fol. 31] without objection of the defendant official literature of the Communist Party, which literature sets forth the doctrines and theses of the Communist Party. The following excerpts are taken from said literature and these excerpts are stipulated to be the true text thereof:

From "Programme of the Communist International":

"The conquest of power by the proletariat is the violent overthrow of bourgeois power, the destruction of the capitalist State apparatus (bourgeois armies, police, bureaucratic hierarchy, the judiciary, parliaments, etc.), and substituting in its place new organs of proletarian power to serve primarily as instruments for the suppression of the exploiters. • • •

"The Soviet State completely disarms the bourgeoisie and concentrates all arms in the hands of the proletariat; it is the armed proletarian State. The armed forces under the Soviet State are organized on a class basis, which corresponds to the general structure of the proletarian dictatorship, and guarantees the rule of leadership to the industrial proletariat. • • •

"This organization, while maintaining revolutionary discipline, insures to the warriors of the Red Army and Navy close and constant contacts with the masses of the toilers, participation in the administration of the country and in the work of building up Socialism."

• • • • • • •

"Thi mass action includes: a combination of strikes and demonstrations; a combination of strikes and armed demonstrations and finally, the general strike conjointly with armed insurrection against the State power of the bourgeoisie. The latter form of struggle, which is the supreme form, must be conducted according to the rules of war; it presupposes a plan of campaign, offensive fighting operations and unbounded devotion and heroism on the part of the proletariat. An absolutely essential condition precedent for this form of action is the organization of the broad masses into militant units, which, by their very form, embrace and set into action the largest possible numbers of toilers (Councils of Workers' Deputies, Soldiers' Councils, etc.), and intensified revolutionary work in the Army and Navy."

On a succeeding page of the same publication is found the following:

"The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at the Communist revolution. The proletarians have nothing to lose but their chains. They have a world to gain.

"Workers of all countries, unite!"

[fol. 32] From "Theses and Statutes of the Third (Communist) International:

"The Communist International makes its aim to put up an armed struggle for the overthrow of the international bourgeoisie and to create an international Soviet republic as a transition stage to the complete abolition of the State. • • •

"The Communist International fully and unreservedly upholds the gains of the great proletarian revolution in Russia, the first victorious Socialist revolution in the World's history, and calls upon all workers to follow the same road. • • •

"The general state of things in the whole of Europe and of America makes necessary for the Communists of the whole world an obligatory formation of illegal Communist organizations along with those existing legally. • • •

"The International League of Communist Youth is subordinate to the Communist International and its executive committee. • • •

"A persistent and systematic propaganda and agitation is necessary in the Army, where Communist groups should be formed in every military organization. Wherever, owing to repressive legislation, agitation becomes impossible, it is necessary to carry on such agitation illegally. But refusal to carry on or participate in such work should be considered equal to treason to the revolutionary cause, and incompatible with affiliation with the Third International. • • •

"The Communist International has declared a decisive war against the entire bourgeoise world and all the yellow Social-Democrat parties. • • •

"The working class can not achieve the victory over the bourgeoisie by means of the general strike alone, and by the

policy of folded arms. The proletariat must resort to an armed uprising. * * *

"The Communist party must be founded on the principle of the strictest centralization, and during the period of civil war it must introduce military discipline in its ranks. * * *"

In "The Communist", published by "the Communist party of the U. S. A.", issue of July, 1929, appears the following:

"When Communists urge strikes and crippling of intustry in time of war, we are accused of trying to bring about the defeat of 'our own' government. To that charge we plead guilty. That is precisely our aim. A government engaged in warfare is weaker than at other times in spite of the fact that its savage repressions make it appear stronger to the superficial observer. At such a moment an organized drive to stop the production of war supplies, to cripple the transportation system, may result in creating such difficulties that the imperialist forces may be defeated. * * *

[fol. 33] "When a revolutionary situation is developing, as a result of war or from any other cause, the party of the proletariat must lead a direct attack against the capitalist State. The slogans put forth must be of such a nature as to guide the movement in its development, which will take the form at first of mass strikes and armed demonstrations. In that stage there arises the question of arming of the working class and disarming the capitalist class. Finally the highest form of struggle is reached, wherein it culminates in the general strike and a merging of large sections of the military forces and the workers for armed insurrection against the capitalist State power.

"We thus indicate the high lights in the development of the revolutionary struggle against the bourgeoisie in order to emphasize the world-historic importance of the mobilization of the working class for the struggle against imperialist war. Every revolutionary worker, realizing the significance of August 1st, will work day and night to make our strike and demonstrations the greatest concerted action on the part of the working class this country has ever seen."

From "Fundamentals of Communism":

"Complete Communism will know no more war. A real, assured people's peace is possible only under Communism. But this goal can not be reached by peaceful, 'pacifist' means; on the contrary, it can be reached only by civil war against the bourgeoisie."

"Manifesto of the Communist Party" contains this:

"The proletariat goes through various stages of development. With its birth begins its struggle with the bourgeoisie. At first the contest is carried on by individual laborers, then by the work people of a factory, then by the operatives of one trade, in one locality, against the individual bourgeois who directly exploits them. They direct their attacks not against the bourgeois conditions of production, but against the instruments of production themselves; they destroy imported wares that compete with their labors, they smash machinery to pieces, they set factories ablaze, they seek to restore by force the vanished status of the workmen of the middle ages."

In the mimeographed circular of December 26, 1933, issued by the Agitation and Propaganda Department of District 12 of the Communist party of the United States, which includes Oregon, appears the following:

"Question 2. The party must teach the masses that it is impossible to maintain the old order and that it is necessary to overthrow it through revolutionary means. Does the party teach this only through agitation and propaganda?

"Answer. 'Agitation and propaganda does not suffice [fol. 34] to bring the masses to a suitable frame of mind. They need also to be schooled by political experience * * *

"'* * * *we shall put forward methods of struggle and forms of organization which will* permit the masses to learn from experience the truth and correctness of our revolutionary watchwords.' (Lenin)

"(strikes, demonstrations, revolutionary unions, unemployed councils.)"

The above italicized matter appears in the circular as underlined type.

"Program of the Young Communist International", approved by the Presidium of the Executive Committee of the Communist International, for use by the Young Communist International, a section of the Communist International, contains among other things the following:

"The overthrow of capitalism has thus become the direct fighting aim of the international working class. It can be achieved only by means of violent revolution. • • •

"The Communists publicly declare that, in order to overthrow the capitalist system and establish the proletarian dictatorship, the armed uprising of the proletariat is necessary. Only by the victory of proletarian arms, by the formation of a Red Army and armed defense of the achievements of the revolution against all attempts of the bourgeoisie, will the proletariat gradually be able to lead mankind toward a classless society in which the use of arms will be a thing forgotten."

In "Why Communism" it is stated:

"We communists say that there is one way to abolish the capitalist State, and that is to smash it by force. To make Communism possible the workers must take hold of the State machinery of capitalism and destroy it."

This pamphlet ends with the following declaration:

"The Communist party of the U. S. A. is thus part of a world-wide organization which gives it guidance and enhances its fighting power. Under the leadership of the Communist party the workers of the U. S. A. will proceed from struggle to struggle, from victory to victory, until, rising in a revolution, they will crush the capitalist State, establish a Soviet State, abolish the cruel and bloody system of capitalism and proceed to the upbuilding of Socialism.

"This is why every worker must join the Communist party." • • •

• • • • • • •

[fol. 35] "Freedom must be fought for and this fight can not wait. It is a matter requiring action right now and every day. Your employers try to prevent you from organizing: organize. They will try to fire your organizers:

stand pat, defend them! They will try to discharge more: answer by calling a strike: picket the plant! They will send policemen and hired deputies to break up your picket line: stand firm, don't yield! They will send a reformist union leader to persuade you to accept boss arbitration: drive him out like a yellow cur! They will put some of your leaders in jail: demonstrate, protest, fill the court room with hundreds of workers, demand the release of your comrade, picket the court house, picket the judge's house, call other workers to help you in your struggle; make your struggle the struggle of great numbers of class conscious workers!"

From page 38, paragraph 5 of "Fundamentals of Communism":

"The Party, while it lends itself in the most active way to the daily needs and the immediate demands of the proletarian masses (of the employed and the unemployed) must clarify and elevate their revolutionary consciousness. It must set up before the eyes of these masses and create in them an understanding for its revolutionary goal, the setting up of the proletarian dictatorship; it must raise the economic struggles for political power (mass strikes and uprisings)."

From page 44 of the "Manifesto of the Communist party":

"The Communist revolution is a most radical rupture with traditional property measures; no wonder that its development involves the most radical rupture with the traditional ideas, • • • In short, the Communists everywhere supported every revolutionary movement against the existing social and political order of things."

From page 771, "The Communist" for August, 1934:

"'• • • Only a Bolshevik struggle before the outbreak of war for the triumph of revolution can assure the victory of a revolution that breaks out in connection with war' (Thirteenth Plenum of the E. C. C. I.). To enhance, deepen and widen the Bolshevik struggle against war is the special task of the August First action. In this struggle, we frankly seek and work for the triumph of the pro-

letarian revolution in the United States and the establishment of a Soviet government in this country."

At the conclusion of the State's case in chief, appellant moved the trial court for an order directing a verdict of acquittal, on the following grounds, among others:

"That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution * * * and Section 1 of Amendment XIV of the United States Constitution * * *."

[fol. 36] "If the evidence introduced by the prosecution be held sufficient to go to the jury upon the portion of the criminal syndicalism statute under which the defendant is here charged, then that portion is a violation of the due process clause of the 14th Amendment to the United States Constitution, because it demands that the defendant comply with a standard of conduct which he could not know in advance."

To the disallowance of said motions exceptions were taken with reference to each of the grounds set forth.

Thereafter and at the conclusion of the testimony, the appellant again moved the trial court for a directed verdict, on the following grounds, among others:

"That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution and Section 1 of Amendment XIV of the United States Constitution."

In disallowing the said motion for a directed verdict the court said:

"The record may show that the motion for a directed verdict of acquittal is denied, and an exception is allowed as to the ruling with reference to each of the specifications set forth."

The jury returned a verdict of guilty and recommended leniency, and based thereon the court entered a judgment of conviction and sentenced appellant to a term of seven years in the Oregon State Penitentiary.

From said judgment of conviction appellant appealed to the Supreme Court of Oregon, alleging as reversible errors, among others, the failure of the trial court to direct a ver-

dict of acquittal and the repugnancy of the Oregon criminal syndicalism law as amended in 1933 to Section 1 of Amendment XIV of the United States Constitution, particularly as construed to sustain the judgment of conviction. The Supreme Court considered the question raised under the Constitution of the United States, stating in its opinion:

"The appellant contends that the State criminal syndicalism law as applied in the present instance is violative of the 14th Amendment of the said Constitution and of Article I, paragraphs 8 and 26, of the Oregon Constitution. Relying on the case of Fiske v. Kansas, 274 U. S. 380 (71 L. Ed. 1108, 47 S. Ct. 655), it is insisted that the law as applied to the present case is an arbitrary and unreasonable exercise [fol. 37] of the police power of the state and unwarrantably infringes the liberty of the defendant."

Dated this 1st day of June, 1936.

Gus J. Solomon, of Attorneys for Appellant. I. H. Van Winkle, Attorney General for the State of Oregon, by Willis S. Moore, Deputy. James R. Bain, District Attorney for Multnomah County, State of Oregon, by Maurice E. Tarshis, Deputy.

[fol. 38] IN CIRCUIT COURT OF MULTNOMAH COUNTY

THE STATE OF OREGON

vs.

DIRK DEJONGE, DON CLUSTER, EDWARD R. DENNY and EARL STEWART, Defendants

INDICTMENT FOR VIOLATION OF SECTION 14-3112, OREGON CODE 1930 AS AMENDED BY CHAPTER 459, GEN. LAWS OF OREGON, 1933—Filed September 29, 1934

Dirk DeJonge, Don Cluster, Edward R. Denny and Earl Stewart are accused by the Grand Jury of the County of Multnomah and State of Oregon, by this indictment of the crime of Conducting and Assisting in Conducting an Assemblage of Persons and Organization Advocating Criminal Syndicalism, committed as follows:

The said Dirk DeJonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D. 1934, in the

County of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to-wit: the Communist Party, a more description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the County aforesaid, this 29th day of September, A. D. 1934.

Witnesses examined before the Grand Jury: John H. Schum. J. C. Callaway. Earl A. Ridings. Walter Peterson. Carl R. Crisp. Dana E. Jewell. Robert B. Smith. L. A. Montgomery. Walter B. Odale. M. R. Bacon. Orvale R. Williams. John A. Goltz.

Lotus L. Langley, District Attorney, by Ben H. Conn, Deputy.

[File endorsement omitted.]

Endorsed: In the Circuit Court of the State of Oregon County of Multnomah. The State of Oregon v. Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart, Defendants. Indictment. A True Bill. N. L. Crout, Foreman of the Grand Jury.

STATE OF OREGON,
County of Multnomah, ss:

The Within defendant- named may be admitted to bail in the sum of $1000 each. Let a warrant issue.

W. A. Ekwall, Circuit Judge.

[fol. 39] [File endorsement omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

VERDICT—Filed November 21, 1934

We, the jury duly impaneled and sworn in the above entitled Court and cause, find the defendant, Dirk De Jonge, Guilty as charged in the indictment.

Effie Y. Powell, Foreman.

[fols. 40 & 41] IN CIRCUIT COURT OF MULTNOMAH COUNTY

No. C-19294

STATE OF OREGON, Plaintiff,

vs.

DIRK DEJONGE, DON CLUSTER, EDWARD R. DENNY and EARL STEWART, Defendants

JUDGMENT—November 26, 1934

Now at this time comes the State of Oregon, by Lotus L. Langley, district attorney, and Charles S. Cohn, deputy, and the defendant Dirk DeJonge appearing in person and with his attorneys Irvin Goodman and Harry L. Gross, and the defendant having been heretofore duly indicted by the Grand Jury of Multnomah County, Oregon, on the 29th day of September 1934, for the crime of Conducting and Assisting in Conducting an Assemblage of Persons and Organization Advocating Criminal Syndicalism, committed in said county and state, on the 27th day of July, 1934, and said defendant Dirk DeJonge having heretofore in said Court been convicted of the crime of Conducting and Assisting in Conducting an Assemblage of Persons and Organization Advocating Criminal Syndicalism, by the verdict of the jury enpanelled to try said cause as appears of record herein and this being the time heretofore set by the court for the passing of sentence herein, and no good reason appearing to the court why sentence should not be pronounced at this time,

It is Therefore Ordered and Adjudged by the court that the defendant Dirk De Jonge be imprisoned in the Oregon State Penitentiary for a period not to exceed seven years. Whereupon the defendant Dirk DeJonge moves for a stay of execution herein, pending the disposition of the motion for a new trial, which said motion is opposed by the State of Oregon, which stay of execution is hereby Ordered denied by the court; and the bail of said defendant herein is fixed in the sum of $1,000.00, provided said bail be posted on this date.

Jacob Kanzler, Judge.

[fol. 42] [File endorsement omitted]

IN SUPREME COURT OF OREGON

STATE, Respondent,

v.

DE JONGE, Appellant

Appeal from Circuit Court, Multnomah County

Jacob Kanzler, Judge

Argued and submitted October 9, 1935

In Banc

Irvin Goodman (with Harry L. Gross, Clifford O'Brien and Dan Hartley on brief), all of Portland, for appellant.

Maurice E. Tarshis and George C. Graham, Deputy District Attorneys (with James R. Bain, District Attorney, on brief), all of Portland, for respondent.

BAILEY, J.
Affirmed.

OPINION—Filed November 26, 1935

BAILEY, J.

The defendant, Dirk De Jonge, was on September 29, 1934, indicted by the grand jury of Multnomah county, Oregon. The charging part of the indictment is as follows:

"The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D. 1934, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to-wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doc- [fol. 43] trine of criminal syndicalism and sabotage, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

This defendant, who was tried separately at his request, after a trial lasting in excess of three weeks, was found guilty as charged. From judgment entered on the verdict he has appealed.

On Friday, July 27, 1934, there was held at what was referred to as Unity Center, 68 Southwest Alder street, Portland, Oregon, a meeting which had been previously advertised by mimeographed handbills issued by the Portland section of the Communist party. The number of people in attendance was variously estimated by some who were present, at one hundred fifty to three hundred. It was estimated by some of the members of the Communist party present that not to exceed 10 to 15 percent of those in attendance were members of the Communist party. No admission charge was made and no question was asked of those entering as to whether or not they were members of or in sympathy with the Communist party. The notice of the meeting advertised it as a protest against raids.

At this meeting Edward R. Denny acted as chairman. The defendant gave the following reason for his own attendance: "I went to that meeting because I was instructed by the section committee of the Communist party through its section organizer, comrade Louis Olson, to speak at that meeting in the name of the Communist party." De Jonge, who admitted that he was for several years had been a member of the Communist party, was the second speaker on the program, and in his talk protested against conditions at the county jail, the action of city police in

relation to the maritime strike then in progress in Portland, and numerous other matters. As stated in his own lan- [fol. 44] guage: "Well, at that meeting, speaking as a Communist, representing the Communist party, I went into a discussion as to why the Workers' Book Shop, the Communist party headquarters, the Marine Workers' Industrial Union hall, the Civic Emergency Federation and International Labor Defense halls were raided. • • • I told the workers there, at least, I laid the background for the reasons why these workers' halls and offices were raided. I told the workers that the reason of these attacks upon the working class organizations was a stepping stone on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break that strike by pitting the maritime longshoremen and seamen against the Communist movement." Much more in addition was stated by defendant concerning what he spoke about in the meeting that evening.

There was also testimony to the effect that Communistic literature was sold at the meeting, among which were "The Young Communist" and "The Daily Worker", and that De Jonge had urged those in the audience to be present at a street meeting of the Communist party scheduled for the next evening, which "would be in defiance of the local police authority". The defendant also made a plea for new members to join the Communist party. Asked whether or not he had urged those present to buy Communistic papers and literature, the defendant answered: "I don't remember whether I did or not. But I usually do at meetings held by the Communist party; that is, every Communist is a literature salesman as well as an organizer." At the trial a vast amount of official Communistic literature was introduced, most of which was received without [fol. 45] objection on the part of defendant. Only a small amount of such literature was found in the hall where the meeting was held.

This meeting was described by most of the witnesses as having been conducted in an orderly manner, except that there was a little stir when the police entered, after the talks had been made and when the meeting was about to be opened for general discussion. A group of those present, however, had formed a "defense circle" to resist any at-

tack by what they referred to as "vigilantes". They had been warned that there might be an attempt by the "vigilantes" to break up the meeting.

The literature introduced into the record refers to the Communist party as the leading force of the proletariat against the bourgeoisie and what is termed "imperialism" and "capitalism". All of it is written in somewhat specialized terminology. There is constant reference in all these writing to "mass movement", "mass activity", "mass organization", "revolutionary action", "revolutionary struggle", "revolutionary proletariat", "proletarian revolution", "mass revolution" and "the revolutionary way out". The limit of this opinion will permit inclusion of only a few excerpts from the literature introduced in evidence.

From "Programme of the Communist International" we quote:

"The conquest of power by the proletariat is the violent overthrow of bourgeois power, the destruction of the capitalist State apparatus (bourgeois armies, police, bureaucratic hierarchy, the judiciary, parliaments, etc.), and substituting in its place new organs of proletarian power to serve primarily as instruments for the suppression of the exploiters. * * *

"The Soviet State completely disarms the bourgeoisie and concentrates all arms in the hands of the proletariat; it is the armed proletarian State. The armed forces under [fol. 46] the Soviet State are organized on a class basis, which corresponds to the general structure of the proletarian dictatorship, and guarantees the rule of leadership to the industrial proletariat. * * *

"This organization, while maintaining revolutionary discipline, insures to the warriors of the Red Army and Navy close and constant contacts with the masses of the toilers, participation in the administration of the country and in the work of building up Socialism."

This same pamphlet after urging to readiness to "lead the working class to the revolutionary struggle for power" and advising mass action "when the revolutionary tides are rising", describes the plan of "attack" as follows:

"This mass action includes: a combination of strikes and demonstrations; a combination of strikes and armed

demonstrations and finally, the general strike conjointly with armed insurrection against the State power of the bourgeoisie. The latter form of struggle, which is the supreme form, must be conducted according to the rules of war; it presupposes a plan of campaign, offensive fighting operations and unbounded devotion and heroism on the part of the proletariat. An absolutely essential condition precedent for this form of action is the organization of the broad masses into militant units, which, by their very form, embrace and set into action the largest possible numbers of toilers (Councils of Workers' Deputies, Soldiers' Councils, etc.), and intensified revolutionary work in the Army and Navy."

On a succeeding page of the same publication is found the following:

"*The Communist disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at the Communist'* [fol. 47] *revolution. The proletarians have nothing to lose but their chains. They have a world to gain.*

"*Workers of all countries, unite!*"

This last quoted excerpt appears in various other Communist publications, printed in italics.

From "Theses and Statutes of the Third (Communist) International" we take the following:

"The Communist International makes its aim to put up an armed struggle for the overthrow of the international bourgeoisie and to create an international Soviet republic as a transition stage to the complete abolition of the State. * * *

"The Communist International fully and unreservedly upholds the gains of the great proletarian revolution in Russia, the first victorious Socialist revolution in the World's history, and calls upon all workers to follow the same road. * * *

"The general state of things in the whole of Europe and of America makes necessary for the Communists of the whole world an obligatory formation of illegal Communist organizations along with those existing legally. * * *

"The International League of Communist Youth is subordinate to the Communist International and its executive committee. * * *

"A persistent and systematic propaganda and agitation is necessary in the Army, where Communist groups should be formed in every military organization. Wherever, owing to repressive legislation, agitation becomes impossible, it is necessary to carry on such agitation illegally. But refusal to carry on or participate in such work should be considered equal to treason to the revolutionary cause, and incompatible with affiliation with the Third International. * * *

"The Communist International has declared a decisive war against the entire bourgeoise world and all the yellow Social-Democrat parties. * * *

"The working class can not achieve the victory over the bourgeoisie by means of the general strike alone, and [fol. 48] by the policy of folded arms. The proletariat must resort to an armed uprising. * * *

"The Communist party must be founded on the principle of the strictest centralization, and during the period of civil war it must introduce military discipline in its ranks. * * *"

In "The Communist", published by "the Communist party of the U. S. A.", issue of July, 1929, appears the following:

"When Communists urge strikes and crippling of industry in time of war, we are accused of trying to bring about the defeat of 'our own' government. To that charge we plead guilty. That is precisely our aim. A government engaged in warfare is weaker than at other times in spite of the fact that its savage repressions make it appear stronger to the superficial observer. At such a moment an organized drive to stop the production of war supplies, to cripple the transportation system, may result in creating such difficulties that the imperialist forces may be defeated. * * *

"When a revolutionary situation is developing, as a result of war or from any other cause, the party of the proletariat must lead a direct attack against the capitalist State. The slogans put forth must be of such a nature as to guide the movement in its development, which will take the form

at first of mass strikes and armed demonstrations. In that stage there arises the question of arming of the working class and disarming the capitalist class. Finally the highest form of struggle is reached, wherein it culminates in the general strike and a merging of large sections of the military forces and the workers for armed insurrection against the capitalist State power.

"We thus indicate the high lights in the development of the revolutionary struggle against the bourgeoisie in order to emphasize the world-historic importance of the mobilization of the working class for the struggle against imperial-
[fol. 49] ist war. Every revolutionary worker, realizing the significance of August 1st, will work day and night to make our strike and demonstrations the greatest concerted action on the part of the working class this country has ever seen."

From "Fundamentals of Communism" we take the following:

"Complete Communism will know no more war. A real, assured people's peace is possible only under Communism. But this goal can not be reached by peaceful, 'pacifist' means; on the contrary, it can be reached only by civil war against the bourgeoisie."

"Manifesto of the Communist Party" contains this:

"The proletariat goes through various stages of development. With its birth begins its struggle with the bourgeoisie. At first the contest is carried on by individual laborers, then by the work people of a factory, then by the operatives of one trade, in one locality, against the individual bourgeois who directly exploits them. They direct their attacks not against the bourgeois conditions of production, but against the instruments of production themselves; they destroy imported wares that compete with their labors, they smash machinery to pieces, they set factories ablaze, they seek to restore by force the vanished status of the workmen of the middle ages."

In the mimeographed circular of December 26, 1933, issued by the Agitation and Propaganda Department of District 12 of the Communist party of the United States, which includes Oregon, appears the following:

"Question 2. The party must teach the masses that it is impossible to maintain the old order and that it is necessary to overthrow it through revolutionary means. Does the party teach this only through agitation and propaganda?

"Answer. 'Agitation and propaganda does not suffice to bring the masses to a suitable frame of mind. They need also to be schooled by political experience * * *
[fol. 50] "'* * * *we shall put forward methods of struggle and forms of organization which will* permit the masses to learn from experience the truth and correctness of our revolutionary watchwords.' (Lenin)

"(strikes, demonstrations, revolutionary unions, unemployed councils.)"

The above matter in italics appears in the circular as underlined type.

"Program of the Young Communist International", approved by the Presidium of the Executive Committee of the Communist International, for use by the Young Communist International, a section of the Communist International, contains among other things the following:

"The overthrow of capitalism has thus become the direct fighting aim of the international working class. It can be achieved only by means of violent revolution. * * *

"The Communists publicly declare that, in order to overthrow the capitalist system and establish the proletarian dictatorship, the armed uprising of the proletariat is necessary. Only by the victory of proletarian arms, by the formation of a Red Army and armed defense of the achievements of the revolution against all attempts of the bourgeoisie, will the proletariat gradually be able to lead mankind toward a classless society in which the use of arms will be a thing forgotten."

In "Why Communism" it is stated:

"We communists say that there is one way to abolish the capitalist State, and that is to smash it by force. To make Communism possible the workers must take hold of the State machinery of capitalism and destroy it."

This pamphlet ends with the following declaration:

"The Communist party of the U. S. A. is thus part of a world-wide organization which gives it guidance and en-

hances its fighting power. Under the leadership of the [fol. 51] Communist party the workers of the U. S. A. will proceed from struggle to struggle, from victory to victory, until, rising in a revolution, they will crush the capitalist State, establish a Soviet State, abolish the cruel and bloody system of capitalism and proceed to the upbuilding of Socialism.

"This is why every worker must join the Communist party."

Instructing members of the Communist party as to conduct required of them in given circumstances, the pamphlet "Why Communism" offers the following directions:

"Freedom must be fought for and this fight can not wait. It is a matter requiring action right now and every day. Your employers try to prevent you from organizing: organize. They will try to fire your organizers: stand pat, defend them! They will try to discharge more: answer by calling a strike: picket the plant! They will send policemen and hired deputies to break up your picket line: stand firm, don't yield! They will send a reformist union leader to persuade you to accept boss arbitration: drive him out like a yellow cur! They will put some of your leaders in jail: demonstrate, protest, fill the court room with hundreds of workers, demand the release of your comrade, picket the court house, picket the judge's house, call other workers to help you in your struggle; make your struggle the struggle of great numbers of class conscious workers!"

In the organization of the Communist party we find as the smallest group what is referred to as the "nucleus" or "unit", existing in a shop, factory, mine or street. A "street nucleus", so-called, consists of at least three members of the Communist party all of whom do not work in the same shop, factory, mine or mill. The next higher division is the "section", which is composed of two or [fol. 52] more units in a given territory. Ordinarily the units belong to the section, but sometimes are directly connected with the district organization. Above the section is the "district", which is composed of sections and outlying units. Multnomah county, Oregon, is included in the "twelfth district" of the Communist party in the United

States, which district comprises Oregon, Washington, Alaska and part of Idaho. Above the district is the "central committee", formed of representatives at large from the various districts of the American party of Communists. "Fractions" are groups of members of the Communist party who work together wherever they find themselves as members of other organizations, committees, parliamentary bodies and workmen's councils. Their obligation is to urge from within the ranks Communistic views and policies upon such non-Communist organizations and bodies.

The Communist party of the United States is affiliated with the Third International, or what is known as the Communist International. All members of the Communist party are under obligation to obey the orders and rulings of the various organizations controlling the unit or section to which they belong.

The appellant contends that the state criminal syndicalism law as applied in the present instance is violative of the Fourteenth amendment of the federal constitution and of Article I, §§ 8 and 26, Oregon constitution. Relying upon the case of Fiske v. Kansas, 274 U. S. 380 (71 L. Ed., 1108, 47 S. Ct. 655), it is insisted that the law as applied to the present case is an arbitrary and unreasonable exercise of the police power of the state and unwarrantably infringes the liberty of the defendant.

[fol. 53] The criminal syndicalism law, §§ 14-3110, 14-3111 and 14-3112, Oregon Code 1930, as amended by chapter 459, Oregon Laws, 1933, reads thus:

"Section 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"Section 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"Section 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster,

document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine."

The crime with which the defendant is charged is that of unlawfully and feloniously presiding at, conducting and assisting to conduct an assemblage of persons, organization, society and group engaged in unlawfully and felo- [fol. 54] niously teaching and advocating the doctrine of criminal syndicalism and sabotage. In the case of Fiske v. Kansas, supra, under the criminal syndicalism statute of Kansas, which is closely similar to the present Oregon law, the indictment charged that the defendant did "by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism and sabotage by * * * knowingly and feloniously persuading, inducing and securing" certain persons "to sign an application for membership in * * * and by issuing to" them "membership cards" in a certain workers' industrial union, "a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates and affirmatively suggest 'that the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people, and the few who make up the employing class have all the good things of life,' and that 'between these two classes a struggle must

go on until the workers of the world organize as a class, take possession of the earth and the machinery of production and abolish the wage system' ".

In passing upon the matter the court there said:

"No substantial inference can, in our judgment, be drawn from the language of the preamble, that the organization taught, advocated or suggested the duty, necessity, propriety or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. There is no suggestion in the preamble that the industrial organization of [fol. 55] workers as a class for the purpose of getting possession of the machinery of production and abolishing the wage system, was to be accomplished by any other than lawful methods; nothing advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means. * * * The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial changes or revolution."

The indictment in the Fiske case, as will readily be seen by perusing the supreme court's decision therein, is materially different from that in the case at bar, in which latter case it is distinctly charged that the organization sponsoring the meeting which defendant conducted or assisted in conducting taught and advocated the doctrine of criminal syndicalism and sabotage. Criminal syndicalism and sabotage are specifically defined by the act, and the crime charged is in the language of the statute.

It is not necessary here to discuss the constitutionality of the Oregon act, questioned by defendant, for that matter was thoroughly covered in the case of State v. Laundy, 103 Or. 443 (204 P. 958, 206 P. 290), and State v. Boloff, 138 Or. 568 (4 P. (2d) 326, 7 P. (2d) 775). See, also, in this connection: Whitney v. California, 274 U. S. 357 (71 L. Ed. 1095, 47 S. Ct. 641), and State v. Hennessy, 114 Wash. 351 (195 P. 211).

Turning now to the grounds for a directed verdict set forth in defendant's motion therefor, we note that he asserts and argues that the indictment charges the assemblage at which he spoke with unlawfully and feloniously teaching

and advocating the doctrine of criminal syndicalism and sabotage, and elsewhere in the same motion he contends [fol. 56] that the indictment charges the defendant with unlawfully and feloniously teaching and advocating said doctrine at said meeting. The indictment does not, however, charge the defendant, nor the assemblage at which he spoke, with teaching or advocating at said meeting at 68 Southwest Alder street, in the city of Portland, the doctrine of criminal syndicalism or sabotage. What the indictment does charge, in plain and concise language, is that the defendant presided at, conducted and assisted in conducting an assemblage of persons, organization, society and group, to-wit, the Communist party, which said assemblage of persons, organization, society and group was unlawfully teaching and advocating in Multnomah county the doctrine of criminal syndicalism and sabotage.

The evidence shows that at the time of the defendant's arrest there were sections, units and fractions of the Communist party existing in Multnomah county, Oregon; that they were selling, distributing and circulating official Communist literature and were furthering their organization and adding new members to the Communist party in Multnomah county. The evidence distinctly shows, as may be noted in excerpts from Communist literature above quoted, that the Communist party was at that time, as well as prior thereto, teaching and advocating the doctrine of criminal syndicalism and sabotage. It was not necessary for the state to show that at the particular moment when defendant was speaking to the assemblage at 68 Southwest Alder street the Communist party did any affirmative act other than as above stated. The meeting at which the defendant spoke was held under the auspices and at the direction of the Communist party. The defendant was sent there by one [fol. 57] of the section organizers, and spoke at the instance of the organizer. The chairman announced that the meeting was held under the auspices of the Communist party. The mere fact that members of that organization constituted only a small percentage of those in attendance and that the public was freely admitted does not change the character of the meeting. The defendant at least assisted in conducting the meeting which was an assemblage of persons sponsored by and under the auspices of the Communist party. He was a member of that party and, the record would indicate, the principal speaker at the gathering.

On rebuttal the state recalled its witness Bacon, and the following testimony was given by him:

"Q. Mr. Bacon, I will ask you to say if at any time while you were a member of the Communist party, between the dates of March and September, 1930, you ever heard any members of the Communist party discussing a major felony? Answer yes or no.

"A. Yes.

"Q. Where, and when, and who was present, and what was this major felony you heard discussed?

"A. Just prior to the demonstration of May 1, 1930, there was a discussion took place in the unit headquarters, at 312 Worcester Building, Portland, in the presence of a member of the District Executive Committee of the Communist party, Reuben Sandstrum, and others, old members of the Communist party, which was in the nature of instructions from this member, directed particularly to myself, which was acceded to and not dissented with, by the other leading members of the party present to the effect that * * * Stalin had taken the money and jewels out of the Czarist banks and had used the money to carry on the revolution; that they had men planted inside these banks, and raided them, and that we—speaking to myself and of himself and others present as Communists—must begin to do that here, and cited one case of a Communist having held up a bank messenger in San Francisco and [fol. 58] obtained forty thousand dollars to carry on the party work. There was no dissent with the suggestion and advocation that such activities be carried on by the party here."

This witness further testified:

"At another time, sometime in July, 1930, there was occasion for the party to send a delegate to represent the lumber workers to the Soviet Union on a trip, and it was required of the Portland unit that they furnish funds for this trip, and a letter was received and read to the unit—to the members, by Reuben Sandstrum, by Jack Laury, who was at that time district organizer of the Trade Unity League section of the Red International of Trade Unions, under whose auspices this trip was being promoted, asking that they raise a sum of $275.00, I believe—I am not certain as to the exact amount, but it was two hundred some dol-

lars, I believe it was $275.00, and suggested that this money be raised from some of the comrades, which they all termed themselves, and if unable to obtain it as a loan—this was written in pencil as a postscript at the bottom of the letter —I saw the letter myself and read it: 'I suggest that you go out and hold up a bank.' "

The defendant was not present at the time these conversations were had, and his counsel objected to the testimony on the ground that it was hearsay; that the question was leading; and that the time and place were not fixed and were too remote. Counsel further objected on the ground that:

"The question calls not only for a conclusion or opinion concerning certain doctrines or alleged doctrines, but it also calls for a conclusion or opinion of law. In other words, this witness will be testifying in two capacities, both as an expert on the law and as an expert on doctrine. And the third thing is this, your honor, this witness was on the stand for a day and a half and we attempted to interrogate him on the very matters, or some of the very matters which the state now is attempting to introduce in rebuttal, and the [fol. 59] state objected very strenuously to any examination of this witness or his qualifications. We attempted to examine him on what he was, or when he was a member of the Communist party, how he understood what he was taught, whether he knew anything about it, and so forth, and at this time the state strenuously objected and was sustained by the court in that examination."

It was contended by the state at the time the objections were made by defendant that the sole purpose of the question was to impeach the testimony of Louis Olson, who had been called as a witness by the defendant and had admitted that he was a member of the Communist party and its section organizer for the Portland section. Mr. Olson had testified that the Communist party did not advocate or countenance the use of violence or force in carrying out the purposes of the party.

At the time of the conversations to which Mr. Bacon testified, he was avowedly a member of the Communist party and uncontradicted testimony shows that Reuben Sandstrum was at that time a member of the district executive committee of that party. In the case of State v. Kowalchuk,

116 Wash. 592 (200 P. 333), wherein the defendant was convicted of violating the sabotage act of that state, the court with reference to objections to certain testimony as hearsay pointed out that the objection was not well taken, and further stated:

"The witness testifying was formerly a member of the organization. Manifestly he could testify as to these doctrines and teachings in so far as they were within his own knowledge, and could testify, without violating the hearsay rule, what the organization, leaders, and officers taught him were the doctrines and teachings of the organization. This is to testify to the fact directly, not what some third person stated to him was the fact."

[fol. 60] As already noted, the purpose assigned by the state in introducing the testimony objected to was to contradict the testimony of the defendant's witness, Louis Olson. A great deal of time was taken by counsel for defendant in having Mr. Olson give expert testimony as to the meaning of many statements appearing in numerous official Communist pamphlets and writings introduced in evidence. Many of these pamphlets had been published and were in use long before the meetings and conversations to which Mr. Bacon referred in his testimony. After giving this expert testimony, Mr. Olson stated, as previously noted, that the Communist party did not teach or advocate violence to attain its ends. In other words, it was the contention of the defendant that the Communist party had not for some time, and did not then, either in its literature or in practice, teach or advocate the doctrine of criminal syndicalism or sabotage. The testimony of Mr. Bacon was not only contradictory of what the witness Olson said but was also cumulative as to much of the documentary evidence which had been introduced into the record without objection. In testifying, Bacon stated definitely the time and place of the conversations. Therefore, his answer met any objection which defendant may have had to the question on that ground.

The objection that Bacon's testimony was hearsay was not amplified in any manner by pointing out in what respect it was deemed hearsay, nor was any objection made that what was said was not sufficiently connected with the Communist party's teachings. Before this testimony was

presented the defendant had introduced evidence as to the organization of the Communist party and indicative of the duty of each member of the party to obey the orders and instructions of those higher in authority. According to the [fol. 61] evidence, Reuben Sandstrom, because of his position, had authority to speak on behalf of the party. The meeting was in the unit headquarters of the Communist party and attended by Communists. For further justification of the admission of this testimony as not within the hearsay rule, and as competent evidence of the teachings of the Communist party, in addition to State v. Kowalchuk, supra, see: State v. Pettilla, 116 Wash. 589 (200 P. 332); Burns v. United States, 274 U. S. 328 (71 L. Ed. 1077, 47 S. Ct. 650); and State v. Boloff, supra.

As one of the grounds for asking a directed verdict, defendant set forth the alleged misconduct of the special prosecuting attorney during the trial of the case, referring to his examination of jurors, his testimony as a witness in the case, his conduct during the trial and his alleged statements made during argument to the jury. There is no one particular incident to which the assignment of error based on the refusal to direct a verdict is predicated. But it is contended that the general conduct of this prosecutor was abusive and prejudicial to defendant, his attorneys and the prospective jurors.

The only matter referred to by defendant in his brief concerning the argument to the jury is as follows: "A final example should suffice: the special prosecutor's concluding argument to the jury (Tr., pp. 1036-1048, inclusive). We shall not relate the argument here. We do state that as an evasion of the issues of the case, particularly as an appeal to prejudice, to patriotism, to hatred, it is probably unique."

No objection to any definite part of the argument by special counsel is referred to in appellant's brief, nor was there any direct reference made thereto in the oral argument before us. The record discloses that in addition to [fol. 62] arguments made by two of defendant's counsel, he himself addressed the jury, although not any of these arguments were reported. Only once during the argument of the special prosecutor did the defendant object, and that was when the special prosecutor had gone outside the record and referred to intimidation presumably practiced by

the Communist party, and said that during the past twelve hours "I have had by home bothered, I have had my wife bothered," which counsel for defendant interrupted by saying: "If your honor please, are we going to be required to meet vague and fantastic tales that may be brought into the case at this time? This is something out of the record. *We have allowed counsel a lot of lee-way.*" [Italics supplied.]

No motion was made by defendant during the closing argument of special counsel, which was the only one made by that prosecutor, or at the conclusion thereof, for a mistrial, nor was any request made to the court during the argument or at its close to have the jury disregard any statement made by him, except as hereinbefore pointed out.

The defendant was ably represented by four attorneys at the trial, and since none of them objected to any part of the argument of the special prosecutor except as herein noted and they do not now base their claim for reversal on any particular act or acts of that prosecutor, we do not deem it necessary to pick out part of a sentence from what was said by him in his closing argument, to which specific utterance no objection was made, and thereon base a reversal of the judgment. We believe, from the entire record, that the acts of the prosecutor referred to by the appellant as grounds for mistrial were not such an abuse of [fol. 63] discretion by the trial court as would warrant a reversal of the judgment from which this appeal was taken.

During the trial of the case there was introduced a carbon copy of a letter signed by H. H. Smith, superintendent of an express company by which defendant's witness Mackrill had been employed. The letter, dated at Seattle April 14, 1930, and addressed to said Mackrill, was as follows: "As a result of your investigation held in my office on April 12th, and in accordance with Rule No. 29 of the agreement, I am obliged to advise you of your dismissal from the service of the company effective from last date of your employment." This letter was introduced while Mr. Wolf was on the stand, who testified that he had custody and possession of the records, that this was a true copy of the letter which had been written to Mr. Mackrill and that in the ordinary course of business of the company the original letter would have been sent by mail to Mr. Maskrill. He further testified that the signature on the

carbon copy so introduced was that of Mr. Smith. Defendant's counsel objected to the introduction of the letter on the ground that there was no proof that the original could not be produced, and, further, that there was no proof that Mr. Mackrill ever received such a letter.

Mr. Mackrill had already testified that he had not received from the express company any such letter. It would therefore be impossible to produce the original sent to him, and secondary evidence of its contents was admissible. The proper foundation for the introduction of this exhibit was laid by showing that in the ordinary course of business the original would have been sent by mail. The object which the state had in introducing this exhibit was to discredit some of Mackrill's testimony, and no prejudicial error was committed by the court in this connection.

[fol. 64] During the cross-examination by defendant's counsel of one of the witnesses for the state the court denied to counsel the right to read at that time from certain exhibits which had been introduced in evidence by the state. The reason given by the court was that, if read by counsel for defendant, such reading should be done in the presentation of his defense. Later, extensive readings from these exhibits were made by defendant's counsel, and no limit was placed on what might be read. It is within the province of the trial court to direct the order of proceedings, and we believe that there was no abuse of discretion in this matter.

At one time during the trial the court thus addressed the jury: "You will recall that from time to time I have cautioned you about your duty during separation. In this connection, the court wishes to ask you a general question, the whole jury and the alternate juror: Did any member of the jury hear a radio address on the Portland station KALE last evening, Sunday, November 4, 1934, between the hours of eight-thirty and eight-forty-five p. m., made by one of the counsel for defense, wherein reference was made to this case? Did any of you happen to hear it?" To this the jurors answered, "No." Defendant's counsel immediately moved for a mistrial on the ground of misconduct on the part of the court, contending that there was nothing before the court on which any question to the jury could be predicated. Without extended discussion, it is sufficient to say that we see no merit in this objection. The

court was striving to see that a fair trial was had, both on behalf of the state and of the defendant, and certainly from the record it is not apparent that the defendant could have been prejudiced in any way by the question.

[fol. 65] Numerous other assignments of error are set out in appellant's brief. Those which we have not specifically discussed are so closely connected with or related to the assignments which we have passed upon that nothing further need be said in regard to them. Some of the assignments are not separately and specifically discussed by the appellant. We have not attempted here to undertake minute treatment of each and every assignment of error under the respective heading presented. We have given all the evidence in the case and the argument on behalf of appellant careful consideration and we are convinced that no prejudicial error was committed by the trial court, and that the defendant has had a fair and impartial trial.

Almost a month was consumed by the circuit court in the trial of this case. Numerous witnesses were heard and many exhibits introduced. The defendant frankly admits that he is, and for some time prior to the date of the meeting at 68 Southwest Alder street, called and held under the auspices of the Communist party, had been, a member of that party; that he attended that meeting and there spoke in the interest of that party under instructions of the section organizer of the Communist party; that he was one of the principal speakers, if not the principal one, at that assemblage; and that every member of the party is a literature salesman and an organizer for the party. He did not deny that at the meeting referred to he urged those present to buy Communist literature and to join the Communist party. His time is almost entirely devoted to promoting the interests of that organization.

Excerpts from official Communist literature have hereinbefore been set out, and it is unnecessary to discuss further their contents. That such literature teaches and ad-[fol. 66] vocates the doctrine of criminal syndicalism and sabotage can not be denied.

It is practically impossible to conduct a trial between conflicting forces for several weeks wherein rulings of the court and conduct of counsel are entirely free from any adverse criticism. Were we to reverse every case in which infractions of the rules as to the introduction of evidence

occurred, there would never be an end to litigation. Before a judgment will, or should, be reversed there must be shown some error of the trial court prejudicial to the rights of the complaining party. As already stated, no such error was committed in the case here in review. The verdict was in accordance with the great weight of the evidence. If we were to resort to the salutary mandate of Article VII, § 3 of our constitution, it should be for the purpose of affirming the judgment.

The legislature has prescribed as a penalty for violation of the criminal syndicalism law imprisonment for one to ten years or a fine of not exceeding $1,000, or both such imprisonment and fine. The trial judge is charged with the duty of imposing sentence and is in a much better position to perform that duty than is an appellate court, due to the fact that he has seen and heard all the witnesses, including the defendant. If the sentence pronounced in this instance be considered too severe, the defendant has his remedy by petition to the chief executive of the state, who has power to reduce the sentence. In considering such a petition many facts may be reviewed which are not contained in the record before this court.

The judgment appealed from is affirmed.

Campbell, C. J., and Kelly and Rossman, JJ., concur.

[fol. 67] CONCURRING OPINION

BEAN, J. (concurring in part):

It is my opinion that under Art. VII, section 3 of the Constitution of Oregon, notwithstanding any errors, or alleged errors, committed during the trial of this case, the judgment and sentence of seven years in the penitentiary should be reversed, and that the cause should be remanded to the circuit court with instructions to sentence the defendant to a term of not exceeding two years in the penitentiary of Oregon.

The testimony in the case, I believe, is sufficient to warrant the finding of the defendant guilty of the crime charged.

Dissenting Opinion

Belt, J. (dissenting):

Dirk De Jonge was convicted of having violated the criminal syndicalism act of this state and sentenced to serve a term of seven years in the penitentiary, nothwithstanding the recommendation of the jury for leniency. It is, indeed, a terrible price to pay for warped ideas. With all deference to the conscientious trial judge who imposed such sentence, and for whom I have a high regard, it seems to me that the sentence has no reasonable relation to the offense alleged to have been committed. No act of violence was involved in the case. De Jonge has never before been convicted of crime. However, it is only fair to say that for many years he has been identified with radical organizations and is generally looked upon as an agitator.

In my opinion, this court, in the interests of justice, should, under and by virtue of Art. VII, § 3 of the Oregon Constitution, materially reduce the penalty. Such is the practice in Oklahoma, by virtue of its Code of Criminal Procedure (§ 3204 Okl. Stats., 1931) when the appellate court concludes that an excessive penalty has been imposed: [fol. 68] Welch v. State, 20 Okl. Cr. 190 (201 P. 524); Fritz v. State, 8 Okl. Cr. 342 (128 P. 170). That this court has the power, under the above Constitutional provision, to modify the judgment and sentence of the lower court, in a criminal action, seems to me to be clear. The people, in adopting this Constitutional provision, however, were careful to provide that the supreme court in a criminal action was not authorized to find the defendant guilty of an offense for which a greater penalty was provided than that of which the accused was convicted in the lower court. I concede that this power should be exercised by the appellate court only in extreme cases, but in my opinion, it would be proper to do so here.

The assignment of error upon which this dissent is principally based pertains to the ruling of the trial court permitting the witness Bacon, who was called by the State, to answer on rebuttal, over the objection of the defendant, the following question:

"Q. Mr. Bacon, I will ask you to say if at any time while you were a member of the Communist Party, between the dates of March and September of 1930, you ever heard any

members of the Communist Party discussing a major felony? * * *."

When objection was interposed, Mr. Doyle appearing as special prosecutor at first stated that "This question is made for the sole purpose of impeaching the testimony of Louis Olson", but later contended that such testimony was admitted "as to whether the Communist Party advocates criminal syndicalism, bank robberies and felonies", and that "it is for the purpose of impeaching that testimony alone". On appeal the theory of impeachment of the witness Olson was apparently abandoned and the state now urges that this testimony was admissible to show that the [fol. 69] Communist party taught and advocated criminal syndicalism.

In response to the question, the witness Bacon thus answered:

"A. Just prior to the demonstration of May 1st, 1930 *there was a discussion* took place in the unit headquarters, at 312 Worcester Building, Portland, in the presence of a member of the district executive committee of the Communist Party, Rueben Sandstrum and others, old members of the Communist Party, which was in the nautre of instruction *from this member,* directed particularly to myself, which was acceded to and not dissented with, by the other leading members of the Party present, to the effect that——

* * * * * * *

"Mr. Goodman: Was the defendant, Dirk DeJonge, present?

"A. No.

* * * * * * *

"A. (Continuing.) to the effect that Stalin had taken the money and jewels out of the Czarist banks and had used the money to carry on the revolution; that they had had men planted inside these banks, and raided them, and that we,—speaking to myself and of himself and others present as Communists,—must begin to do that here, and cited one case of a Communist having held up a bank messenger in San Francisco and obtained forty thousand dollars to carry on the Party work. There was no dissent with that sugges-

tion and advocation that such activities be carried on by the Party here.

"At another time, some time in July, 1930, there was occasion for the Party to send a delegate to represent the lumber workers of the Soviet Union on a trip, and it was required of the Portland unit that they furnish funds for this trip, and a letter was received and read to the unit,—to the members, by Rueben Sandstrum, by Jack Laury, who was at that time district organizer of the Trade Unity League section of the Red International of Trade Unions, [fol. 70] under whose auspices this trip was being promoted, asking that they raise a sum of $275.00, I believe,—I am not certain as to the exact amount, but it was two hundred some dollars, I believe it was $275.00, and suggested that this money be raised from some of the comrades, which they all termed themselves, and if unable to obtain it as a loan,—this was written in pencil as a postscript at the bottom of the letter,—I saw the letter myself and read it: 'I suggest that you go out and hold up a bank.' *Those are two specific instances* that I remember very clearly. Also on May 1st, 1930, they gave out the program of the march——." (Italics ours.)

In my opinion, this evidence was clearly inadmissible. Diligent search of the authorities reveals none going so far as to hold that a witness can relate a conversation had, in the absence of the defendant, with some member of the Communist party who purports to state what such party teaches and advocates, unless it be shown that such person was authorized to so speak. Especially do courts reject the evidence of the commission of particular crimes by some member of an organization, as tending to show what the organization taught and advocated.

In the instant case the alleged conversation or discussion occurred approximately four years prior to the meeting in question. The defendant is deprived of the opportunity to cross examine the person alleged to have made such statements, relative to his knowledge or conception of the organization about which he speaks. As stated in People v. Ware, 67 Cal App. 81 (226 P. 956):

"The testimony of a witness as to talks which he had with persons whom he believed to be members of the organization, whether such belief be founded upon member-

ship cards shown to the witness or upon declarations made to him by such supposed members, and in which talks the persons whom the witness so believed to be members made [fol. 71] statements of what purported to be the purposes, objects, principles, or teachings of the organization, is hearsay testimony, and as such is inadmissible." Citing, in support thereof, State v. Gibson, 115 Wash. 512, 197 P. 611; State v. Cantwell, 119 Wash. 665, 206 P. 362—the latest expression of the Washington Supreme Court.

Also to the same effect, see State v. Pettilla, 116 Wash. 589 (200 P. 332); People v. Wagner, 66 Cal. App. 153 (225 P. 464); People v. Bailey, 66 Cal App. 1 (225 P. 752); State v. Dingman, 37 Idaho 253 (219 P. 760).

State v. Boloff, 138 Or. 568 (4 P. (2d) 326, 7 P. (2d) 775), is not to the contrary. In that case the witness was permitted, without objection, to repeat a portion of a speech made by an authorized speaker of the Communist party. As stated therein, the speaker Leavitt "was an agent of the society, acting within the scope of his authority when he spoke". The distinction to which attention has been directed was clearly recognized by Mr. Justice ROSSMAN, speaking for a majority of the court, as is evidenced by his comment upon the holding in State v. Dingman, supra. It will be recalled that, in the instant case, the question to which objection was made sought to have Bacon testify about a conversation relative to the commission of major felony which was had "at any time" by "any members of the Communist Party".

We think the court also erred in receiving, over the objection of the defendant, a carbon copy of the letter addressed to Nolan A. Mackrill, a witness for the defendant. This letter purported to give the reason for dismissal from the Railway Express of Mackrill who was called on behalf of the defense to state what occurred at the meeting of the Communist party. On cross-examination he was questioned [fol. 72] at length concerning his services with the Railway Express and the reason for his dismissal. In answer to a question, he stated in substance that he had never received a letter from the company giving the reason for his discharge. The State, to impeach this witness upon what it seems to me was a wholly collateral matter which had nothing whatever to do with the charge in the indictment, intro-

duced in evidence a carbon copy of a letter purporting to have been written to Mackrill. There was no showing that the original letter had been mailed to Mackrill or received by him, nor did the State make any showing for the admission of secondary proof. The error was accentuated by the following argument made by Mr. Doyle of counsel for the State:

"And when you stop to think of this man Mackrill, who brought on to the job, mind you,—and he was the express messenger, don't forget this, and he had four special agents, and somebody gave him some liquor, and he gave the liquor to those four men who were shotgun guards in charge of a million dollars of Government gold. But he didn't drink any, himself.

"And then he lied point blank, cold perjury, anything you want to call it, when I asked him the question directly as to Rule G. He wouldn't come clean; he hasn't, and won't."

It may be that this assignment of error in itself would not be sufficient to justify a reversal, but it is nevertheless a matter for consideration in determining whether the defendant had the kind of trial which the law contemplates.

Appellant also complains about the alleged misconduct of counsel for the State in his final argument to the jury. In addition to the above, the following portion of the argument is noted:

"I will tell you the type of man this DeJonge is. And I will tell you further than that, each and every one of this [fol. 73] jury, if these were war times, there wouldn't be a trial here at all; I wouldn't be able to hold down the sentiment that has accumulated as a result of this man's dangerous activities."

Such argument was highly improper and prejudicial to the rights of the defendant. It was an appeal to passion and prejudice. Any reference to what a mob might do in dealing with the defendant, under any circumstances, is beyond the pale of legitimate argument—even making due allowance for the zeal of counsel.

For the reasons above stated, I dissent from the judgment of conviction.

Rand, J., concurs in this dissenting opinion.

[fol. 74] IN SUPREME COURT OF OREGON

In Banc

STATE OF OREGON, Respondent,

vs.

DIRK DE JONGE, Appellant

Appeal from Multnomah County

JUDGMENT—November 26, 1935

This cause on October 9, 1935, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

It is therefore ordered that the respondent have judgment against the appellant for its costs and disbursements in this court taxed at $—.

It is further ordered that this cause be remanded to the court below from which the appeal was taken, with directions to enter a judgment in accordance herewith.

[fol. 75] IN SUPREME COURT OF OREGON

In Banc

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—January 21, 1936

This cause having been submitted on appellant's petition for a rehearing herein, and at this time the court being fully advised in the premises, it is ordered that said petition be and the same is hereby denied.

[fol. 76] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: In forma pauperis. File No. 40,663. Oregon Supreme Court. Term No. 123. Dirk De Jonge, appellant, vs. The State of Oregon. Filed June 16, 1936. Term No. 123, O. T., 1936.

[fol. 48] [Stamp:] Office of the Clerk, Received Oct. 27, 1936. Supreme Court U. S.

UNITED STATES SUPREME COURT, OCTOBER TERM, 1936

No. 123

DIRK DEJONGE,

against

STATE OF OREGON

Appellant relies on the following points:

1. The Oregon Criminal Syndicalism Law, under which he was convicted, is unconstitutional in that it denies appellant liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution by reason of its limitation on his right of freedom of speech and freedom of assemblage.

2. The Oregon Criminal Syndicalism Law as construed by the Supreme Court of the State of Oregon and applied in this case is unconstitutional in that it denies appellant liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution by reason of its limitation on his right of freedom of speech and freedom of assemblage.

3. The Trial Court erred in failing to grant appellant's motion for a directed verdict on the ground that there was no evidence sufficient to permit a finding of guilty.

Dated, New York, October 26, 1936.

Osmond K. Fraenkel, Attorney for Appellant.

FILE COPY

SUPREME COURT OF THE [illegible]

OCTOBER TERM, 19[illegible]

No. 123

DIRK De JONGE,

Appellant,

vs.

STATE OF OREGON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON.

STATEMENT AS TO JURISDICTION.

Osmond K. Fraser,

Counsel for Appellant.

[illegible]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 123

DIRK DE JONGE,

Appellant,

vs.

STATE OF OREGON.

Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THIS HONORABLE COURT:

Dirk De. Jonge, the above named appellant, herewith makes his statement, in accordance with Rule 12 of the Rules of this Court, particularly describing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of conviction rendered by the Circuit Court of the State of Oregon for Multnomah County, which judgment was affirmed by the Supreme Court of the State of Oregon.

A. Statutory Provisions.

The statutory provisions upon which your appellant relies to sustain jurisdiction of the Supreme Court is Judicial

Code 237 (a), as amended (28 U. S. C. A., Section 344), which, so far as pertains herein, provides:

> "A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had * * * wherein is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B. Statute, the Validity of Which is Involved.

Appellant challenges the validity of the Oregon Criminal Syndicalism Law, being paragraphs 14-3110, 14-3111 and 14-3112, Oregon Code of 1930, as amended by Chapter 459, Oregon Laws of 1933, which reads as follows:

"AN ACT to amend sections 14-3,110, 14-3,111 and 14-3,112, Oregon Code 1930, and to repeal section 14-3,113, Oregon Code 1930, relating to criminal syndicalism.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:

SECTION 1. That section 14-3,110, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

SEC. 14-3,110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

SECTION 2. That section 14-3,111, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

SEC. 14-3,111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

SECTION 3. That section 14-3,112, Oregon Code 1930, be and the same hereby is amended so as to read as follows:

SEC. 14-3,112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than 10 years, or by a fine of not more than $1,000, or by both such imprisonment and fine.

SECTION 4. That section 14-3,113, Oregon Code 1930, be and the same hereby is repealed."

C. **Dates.**

The date of the judgment of conviction entered in the Circuit Court of the State of Oregon is November 26, 1934. The date of the affirmance of said judgment by the Supreme Court of the State of Oregon is November 26, 1935. A timely petition for rehearing was entertained by that court and was denied on January 21, 1936. The date upon which the application for appeal is presented is April 17, 1936.

Nature of the Case.

Dirk De Jonge, the appellant herein, together with several others, were jointly indicted by the Grand Jury of Multnomah County, Oregon, on the 29th day of September, 1934, charged with the crime of conducting and assisting in conducting an assemblage of persons an organization advocating criminal syndicalism, the charging part of the indictment being as follows:

> "The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D. 1934, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to-wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

in violation of Section 14-3112, Oregon Code, 1930, as amended by Chapter 459, General Laws of Oregon for 1933.

The appellant, Dirk De Jonge, requested a separate trial, which request was granted.

The evidence adduced by the State against appellant showed that at 8:00 p. m. on July 27, 1934, at 68 S. W. Alder St. in Portland, Oregon, a meeting sponsored by the Communist Party was held. The announced purpose of the meeting was evidenced by handbills and leaflets issued by the Communist Party, Portland Section, and circulated

in the City of Portland, giving notice of the time and place of this meeting, was to protest against illegal raids on workers' halls and homes, and to protest against the shooting of striking longshoremen by Portland police. There were approximately 160 to 200 people present. No admission charge was made and no questions were asked of those entering as to whether or not they were members of or in sympathy with the Communist Party, and only a small percentage of those present were members of the Communist Party.

The State's witnesses testified that the chairman, Edward R. Denny, stated in opening the meeting that it was a meeting held by the Communist Party, but the defense witnesses all stated that it was not a meeting of the Communist Party but a meeting sponsored by the Communist Party. Denny introduced the various speakers on the program. The first speaker was Don Cluster, a member of the Young Communist League. The second speaker was Dirk De Jonge, the appellant herein, who, upon being introduced, received quite an ovation from those present. Dirk De Jonge talked at some length about the raid on the Workers' Book Shop, the Communist Party's headquarters, the Marine Industrial Workers' Hall, and the International Labor Defense Hall. The three State's witnesses, who were present at the meeting, testified at the trial that Dirk De Jonge requested everyone to do more work in getting more members for the Communist Party, and requested all the people at the meeting to be present at the regular street meeting of the Communist Party to be held on Fourth and Alder Sts. on the following evening, and that during the course of his remarks he used the words "revolutionary tactics" and "defiance of local police authorities".

The defendant and all of the defendant's witnesses denied that Dirk De Jonge had used the words "revolutionary tac-

tics." or "defiance of local police authorities" during the course of his remarks, and they also denied that Dirk De Jonge had requested those present to join the Communist Party or to get more members for the Communist Party.

At the conclusion of his speech De Jonge received a tremendous ovation from those present at the meeting. *The Daily Worker* and *The Young Communist*, a magazine published by the Young Communist League, were sold at the meeting.

The meeting was an orderly one except that there was some confusion when the police entered, which was after the scheduled talks had been made and the meeting was about to be opened for general discussion. A State's witness testified that when the police entered someone hollered "Cops" and disorder broke out immediately, some making a run for fire escapes, stairways and windows. As a result of this raid, De Jonge and several others were arrested.

The State introduced an abundance of official literature of the Communist Party to show that the Communist Party advocates the doctrine of criminal syndicalism and sabotage. This literature was introduced without objection, but only a small portion of the literature introduced was found at the meeting, and none of the literature was written by the appellant or anyone residing in Multnomah County, Oregon.

At the conclusion of the State's case in chief, appellant moved the trial court for an order directing a verdict of acquittal, on the following grounds, among others:

> "That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution * * * and Section 1 of Amendment XIV of the United States Constitution. * * *"
>
> "If the evidence introduced by the prosecution be held sufficient to go to the jury upon the portion of the

criminal syndicalism statute under which the defendant is here charged, then that portion is a violation of the due process clause of the 14th Amendment to the United States Constitution, because it demands that the defendant comply with a standard of conduct which he could not know in advance."

To the disallowance of said motions exceptions were taken with reference to each of the grounds set forth.

Thereafter and at the conclusion of the testimony, the appellant again moved the trial court for a directed verdict, on the following grounds, among others:

"That the Oregon criminal syndicalism law as amended by the 1933 Legislature violates Amendment I of the United States Constitution and Section 1 of Amendment XIV of the United States Constitution."

In disallowing the said motion for a directed verdict, the court said:

"The record may show that the motion for a directed verdict of acquittal is denied, and an exception is allowed as to the ruling with reference to each of the specifications set forth."

The jury returned a verdict of guilty and recommended leniency, and based thereon the court entered a judgment of conviction and sentenced appellant to a term of seven years in the Oregon State Penitentiary.

From said judgment of conviction appellant appealed to the Supreme Court of Oregon, alleging as reversible errors, among others, the failure of the trial court to direct a verdict of acquittal and the repugnancy of the Oregon criminal syndicalism law as amended in 1933 to Section 1 of Amendment XIV of the United States Constitution, particularly as construed to sustain the judgment of conviction. The

Supreme Court considered the questions raised under the Constitution of the United States, stating in its opinion:

> "The appellant contends that the State criminal syndicalism law as applied in the present instance is violative of the 14th Amendment of the said Constitution and of Article I, paragraphs 8 and 26, of the Oregon Constitution. Relying on the case of *Fiske* v. *Kansas*, 274 U. S. 380 (71 L. Ed. 1108, 47 S. Ct. 655), it is insisted that the law as applied to the present case is an arbitrary and unreasonable exercise of the police power of the state and unwarrantably infringes the liberty of the defendant."

Despite these contentions made by appellant and noted for consideration by the court, the court affirmed the judgment of conviction, upholding the Oregon criminal syndicalism law, as amended by the 1933 Legislature and as applied in this instance, not to be in conflict with Section 1 of Amendment XIV of the United States Constitution.

Vol. 21, No. 8, page 317, Advance Sheets, Supreme Court of the State of Oregon; 51 Pac. 2nd 674, 679.

A petition for rehearing was seasonably made, appellant again urging the repugnacy of the Oregon criminal syndicalism law as amended in 1933 and particularly as applied in this instance, to Section 1 of Amendment XIV of the United States Constitution. The motion for rehearing was denied, without written opinion, on January 21, 1936.

Vol. 22, No. 4, Advance Sheets, Supreme Court of the State of Oregon.

Appellant's Contentions.

Appellant contends:

1. That the statute as construed and applied by the Supreme Court of Oregon unreasonably restricts appellant's freedom of speech and assembly, and is therefore invalid

under the due process clause of the 14th Amendment to the Constitution of the United States.

2. That the statute as construed by the Supreme Court of Oregon contains a standard of guilt which is so vague and uncertain that it is not susceptible of reasonable application, and is therefore invalid under the due process clause of the 14th Amendment to the Constitution of the United States.

Substantial Federal Questions are Presented.

Under the criminal syndicalism law of Oregon as construed by the Supreme Court of Oregon, one who shall preside at, conduct or assist in conducting any assemblage of persons, or any society or any group which generally teaches or advocates the doctrine of criminal syndicalism or sabotage, is guilty of a felony, even though membership in such an assemblage, society or group is lawful, and even though the meeting in question was called for a lawful purpose and even though no unlawful doctrines were taught, advocated or even uttered at that meeting.

We submit that the statute as construed by the State court deprives appellant of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States, and raises substantial Federal questions.

1. The statute as construed above contains a standard of liability which is so vague and uncertain that it is not susceptible of reasonable application.

Under this construction no person could risk speaking at a meeting called by the Communist Party, for the following reasons:

a. It is not necessary that the defendant be a member of the Communist Party or be in sympathy with any portion of its program.

b. It is not necessary that the defendant teach or advocate any of the doctrines of the Communist Party which are offensive to the statute, at the meeting which he assists in conducting or at any other place or at any other time.

c. It is not necessary that anyone else at the public meeting called by the Communist Party teach or advocate a doctrine offensive to the statute.

In other words, under the statute as construed by the State court a person not a Communist and unsympathetic with the program of the Communist Party, who presides at an orderly public meeting called by the Communist Party, is guilty of a felony, and the fact that the meeting was called to discuss topics of political, economic or social interest, or any other lawful subject, and the fact that only a small percentage of those present at the meeting were members of the Communist Party or sympathetic with its program, and the fact that neither the defendant nor anyone else at the meeting taught, advocated or even uttered an offensive doctrine would not relieve defendant of criminal liability.

If guilt may be predicated upon the facts stated in the above set of facts, we submit that the statute as so construed would deprive that defendant of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States, but if the above interpretation of the statute is incorrect, then the statute is too vague and uncertain for valid enforcement, and is repugnant to the due process clause of the 14th Amendment.

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary rules of fair play

and the settled rules of law. And a statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Connally v. *General Construction Co.*, 269 U. S. 385, 391;

International Harvester Co. v. *Kentucky*, 234 U. S. 216;

U. S. v. *L. Cohn Grocery Co.*, 255 U. S. 81.

2. The statute as construed and applied by the Supreme Court of Oregon unreasonably restricts appellant's freedom of speech and assembly, and is, therefore, invalid under the due process clause of the 14th Amendment to the Constitution of the United States.

The First Amendment to the Constitution of the United States reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

While this provision is a restraint on our national government and not upon the powers of the state (*United States* v. *Cruikshank*, 92 U. S. 542), the States are precluded from abridging the freedom of speech, or of the press, or of assembly, by the due process clause of the 14th Amendment.

Grosjean v. *American Press Co., Inc.*, No. 303, October Term, 1935, Decided February 10, 1936;

Near v. *Minnesota*, 283 U. S. 697;

Stromberg v. *California*, 283 U. S. 359;

Fiske v. *Kansas*, 274 U. S. 380;

Whitney v. *California*, 274 U. S. 357.

In the case of the *United States* v. *Cruikshank, supra,* the Court, in discussing the right of assembly, stated in its opinion:

> "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat., 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.'"

* * * * * * *

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

The facts in the case of *State* v. *Butterworth,* 104 N. J. Law 580, 142 Atl. 57. are similar to those in the case at bar, except that in the cited case the assemblage was approximately ten times as large, and the meeting was held in a public square without a permit, and not in a hall. Although the defendants were indicted for the common law crime of unlawful assemblage and not for a statutory crime, the Court, in discussing one's constitutional rights of assemblage, stated as follows:

> "The right of the people to meet in public places to discuss in open and public manner all questions affecting their substantial welfare, and to vent their

grievances, to protest against oppression, economic or otherwise, and to petition for the amelioration of their conditions, and to discuss the ways and means of attaining that end, were rights confirmed and guaranteed them by the Magna Charta, Petition of Right, and the Bill of Rights, the mainstay of the British Constitution, and the basis for both our Federal and State Constitutions. Of course, it goes without saying, this inestimable boon of liberty was to be enjoyed by the people in a peaceful and law-abiding manner."

It appears from the testimony, a summary of which is contained in the statement of the nature of the case, *supra* (page 4), that appellant was one of the speakers at a public meeting called by the Communist Party to protest against illegal raids on workers' halls and homes, and to protest against the shooting of striking longshoremen by Portland police. No offensive doctrines were taught or advocated at that meeting by appellant or anyone else. This is conceded by the Supreme Court of Oregon, which holds that it was not necessary for the State to prove that any offensive doctrines were taught or advocated at that meeting, it being sufficient to show that on the date charged in the indictment, the Communist Party in Multnomah County was advocating offensive doctrines. The Supreme Court further held that this could be and was proved by the Communist literature, a small amount of which was found in the hall in which the meeting was held, but a great deal of which was introduced at the trial.

The construction of the statute by the court below cannot be regarded as a reasonable exercise of the State's power to protect it against violent assault, and the statute so construed must be regarded as an arbitrary interference with appellant's right of freedom of speech and freedom of assemblage. As in the case of *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, the evidence did not justify the conviction

of appellant under the statute as construed by the court below, and the application of the statute to appellant accordingly deprived him of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States.

WHEREFORE it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of this Court.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 123

DIRK DEJONGE,

Appellant,

vs.

THE STATE OF OREGON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR APPELLANT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 123

DIRK DEJONGE,

Appellant,

vs.

THE STATE OF OREGON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR APPELLANT.

I. Opinion of the Court Below.

This case comes to this Court by Appeal, probable jurisdiction having been noted by the Court on October 19, 1936.

The opinion below is reported in 152 Ore. 315, and appears in the record commencing at page 20. The separate concurring opinion and dissenting opinion do not relate to the questions before this Court.

II. Jurisdiction.

1. The statutory provision sustaining the jurisdiction is Judicial Code, Section 237 (a), as amended (28 U. S. C. A., Sec. 344).

2. The date of the judgment to be reviewed is November 26, 1935 (R. 46). A petition for rehearing was seasonably made and was denied January 21, 1936 (R. 46). The petition for the allowance of the appeal was filed April 17, 1936 (R. 1), and the appeal was allowed April 20, 1936 (R. 6). The papers were filed with this Court on June 16, 1936 (R. 47).

3. The case comes within the jurisdictional provisions as appears from the following:

At the conclusion of the State's case appellant moved for a direction of acquittal, claiming that the law under which he was charged violated the due process clause of the Fourteenth Amendment (R. 16). At the conclusion of the entire testimony appellant again moved for a directed verdict on substantially the same ground (R. 16). The Oregon Supreme Court expressly considered the question so raised and ruled against appellant (R. 29-31). The precise question was whether or not Oregon's Criminal Syndicalism Law as construed and applied to the facts of this case deprived appellant of his liberty without due process of law.

4. The following cases are relied on to sustain jurisdiction: *Stromberg* v. *California,* 283 U. S. 359, and *Fiske* v. *Kansas,* 274 U. S. 380. In the first of these cases this Court held void a law restricting the display of the red flag because of the vagueness of the law and the possibility that wholly lawful acts might be punished. In the second case this Court set aside a conviction because of the invalidity of the statute as applied to the facts of the particular case.

III. Statement of the Case.

The Criminal Syndicalism Law of Oregon is to be found in Code 1930, Sections 14-3110-3112, as amended by Chapter 459 of the Laws of 1933. It is set forth in full in the

appendix to this brief. Criminal syndicalism is defined as advocacy of the use of unlawful means to effect industrial change or revolution. The law punishes various acts, such as the teaching of this doctrine, the printing, selling or distribution of literature advocating it, the organization of a society which teaches it, as well as assisting and conducting a meeting of any organization which teaches the prohibited doctrine. It may be noted in passing that membership in a proscribed organization is not made a crime although such had been the law prior to the amendment of 1933.*

Appellant was indicted solely on the charge that he assisted at a meeting (R. (17-18). The indictment in substance charged that appellant assisted in conducting a meeting of the Communist Party on July 27, 1934, and that the Communist Party "then and there" advocated criminal syndicalism (R. 17-18). The Supreme Court of Oregon constructed this indictment as charging, not that the meeting at which appellant asisted advocated this doctrine, but merely that the Communist Party generally at the time charged in the indictment advocated it (R. 32). By sustaining the conviction the State court necessarily construed the statute in the same way: as punishing assistance at a meeting solely because of the auspices under which the meeting was held, regardles of what happened at the meeting itself.

The evidence at the trial, which was lengthy, has not been transcribed for this Court. Instead counsel have agreed upon a stipulation of the essential facts (R. 7-17). From these it appears that appellant was a speaker at a meeting which had been advertised by the Communist Party and that he was instructed to speak at that meeting in the name of the Party (R. 8). The meeting was called to protest

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* This change was evidently prompted by the harsh result of the *Boloff* case, 138 Ore. 568.

against illegal raids on workers' halls and homes and to protest against the shooting of strikers by the local police (R. 8). There were from 150 to 300 persons present at this meeting of which not more than 10% or 15% were members of the Communist Party (R. 7). The meeting was open to the public without charge and no questions were asked persons entering the hall as to their membership in or sympathy with that Party (R. 8).

At this meeting appellant stated that the attacks on the working class organizations were part of the effort of the steamship companies to break the longshoremen's and seamen's strike then in progress (R. 8). He advocated a drive to get more members for the Communist Party, requested those present to attend a forthcoming street meeting in defiance of the police, and urged the purchase of some of the literature being sold at the meeting, such as The Young Communist and The Daily Worker (R. 9). He was not indicted either for obtaining members in the Party or for in any way promoting the sale of party literature. There was no evidence of activity of any kind by the appellant on behalf of the Communist Party, except his participation in this one meeting.

The stipulation shows that this meeting was orderly and that appellant was arrested when the meeting was raided by the police (R. 9).

At the trial evidence was introduced by both sides on the question of the advocacy by the Communist Party of the doctrine of criminal syndicalism (see R. 32, 34). Since the jury found for the State on this issue it does not survive for the purposes of this appeal.

Defendant was sentenced by the Court for a term of seven years (R. 20).

IV. Errors Relied Upon; Summary of Argument.

The errors assigned in this Court are two:

1. That the State criminal syndicalism statute violated the due process clause of the Fourteenth Amendment (R. 5).

2. That the Criminal Syndicalism Law, as construed by the Supreme Court of Oregon and applied in appellant's case, violated the due process clause of the Fourteenth Amendment (R. 5).

Each assignment rests upon the refusal of the trial court to direct a verdict in favor of appellant upon such grounds (R. 46).

Appellant contends:

1. That the law is unconstitutional because, as construed by the Supreme Court of the State and as applied, it punishes participation in a lawful meeting, merely because the meeting was called by a group which the jury found elsewhere advocated the prescribed doctrines.

2. That appellant was entitled to a directed verdict.

Point I.

The Oregon Criminal Syndicalism Law as Construed by the Supreme Court of the State of Oregon and applied in this case is unconstitutional in that it denies appellant liberty, without due process of law in contravention of the Fourteenth Amendment to the United States Constitution by reason of its limitation on his right of freedom of speech and freedom of assemblage.

That the right to freedom of speech is protected by the due process clause of the Fourteenth Amendment is now

settled beyond possibility of argument. *Grosjean* v. *American Press Company,* 297 U. S. 233. In that case, indeed, Mr. Justice Sutherland, construing the first Scottsboro decision, *Powell* v. *Alabama,* 287 U. S. 45, said:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment."

Article I of the Amendments to the United States Constitution includes not only freedom of speech and freedom of the press but also "the right of the people peaceably to assemble." This Court in *United States* v. *Cruikshank,* 92 U. S. 542, pointed out that the right peaceably to assemble was an essential attribute of citizenship under a free government. Chief Justice Waite said:

> "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

This Court again, in *Whitney v. California,* 274 U. S. 357, evidently assumed that the right of assembly was among those now guaranteed by the Fourteenth Amendment against infringement by State action. Appellant contends, for these reasons, that the statute under which he was indicted was an unconstitutional denial of his rights to both freedom of speech and freedom peaceably to assemble.

In the case at bar it is conceded that the assembly was peaceful (R. 9); there is no claim in the indictment to the contrary. Indeed, there is not even a claim in it that the meeting advocated prohibited doctrines, and, as already noted, the State Supreme Court in its opinion expressly

held that the indictment did not so charge (R. 32). Judge Bailey there said:

> "The indictment does not, however, charge the defendant, nor the assemblage at which he spoke, with teaching or advocating at said meeting * * * the doctrine of criminal syndicalism or sabotage."

The question presented to this Court (and in this case for the first time), is whether a statute is constitutional which punishes a person for participation in a lawful meeting, called for a lawful purpose, merely because the meeting was called by an organization which, it is charged, advocated prohibited doctrines.

It is submitted that within the ruling of this Court in *Stromberg* v. *California*, 283 U. S. 359, the portion of the statute here involved is void. There a California law was held void because it was so vaguely drawn that wholly innocent acts might be punished under it. That law prohibited the display of a red flag at a meeting "as a sign, symbol and emblem of opposition to organized government." Despite the facts that the statute also punished the display of a flag as a stimulus to anarchistic action and as an aid to seditious propaganda, and that defendant had been convicted under an indictment bringing all these charges, this Court reversed the conviction on the ground that the first portion of the statute "might be construed as embracing conduct which the State could not constitutionally prohibit." The Chief Justice pointed out that the maintenance of the opportunity for free discussion was essential to the security of the country and was fundamental to our constitutional system. He then said:

> "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity

is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

The case at bar is even stronger than the *Stromberg* case, since appellant's conviction rests upon a single portion of the statute. That statute, insofar as it is material, punishes anyone who assists "in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism." It is at once apparent that the statute can be so construed that it is not essential that the person charged with having violated it himself advocate the doctrine of criminal syndicalism or participate in any way in any such actual advocacy. It is thus that it has actually been construed in the case at bar.

Under such interpretation of this law, any person could be convicted who participated in a symposium called by the Communist Party for the discussion of the campaign issues of the current year, were such a person a Democrat, a Republican, or a member of any other political party, and that, entirely regardless of what might or might not have been said at the meeting he attended. It would constitute an attempt to make criminal the mere association in even a casual way with any persons accused of any wrongdoing at all—a doctrine wholly repugnant to the American system of justice. See *People* v. *Pieri*, 269 N. Y. 315, at 323.

Under this construction no person could risk speaking at any meeting called by the Communist Party, for it becomes evident under such construction that the accused person does not need to be a member of the Party or in sympathy with any part of its program, to be convicted. Under this construction it is not necessary that the accused person teach or advocate any doctrine offensive to the statute either at the meeting or at any other time. Nor is it neces-

sary that anyone else at the meeting teach or advocate any offensive doctrine.

It may be pointed out, further, that the various criminal syndicalism and criminal anarchy statutes have been applied almost exclusively in order to punish people for their activity on behalf of the under-privileged or the unemployed. In most such cases no direct advocacy even of prohibited doctrine has been charged to the defendant and conviction has rested largely on the verbiage of pamphlets.* The abuse to which these laws can easily be put requires, therefore, the greatest scrutiny by this Court that the Constitutional guarantees of freedom of speech and freedom of assemblage be not destroyed.

There is nothing in *Gitlow* v. *New York,* 268 U. S. 652, or in *Whitney* v. *California,* 274 U. S. 357, which supports the conviction in the case at bar. The doctrine there announced, that validity must be given to legislative declarations that the act of assisting and organizing an unlawful association involved "such danger to the public peace and the security of the state that these acts should be penalized," is wholly inapplicable to the circumstances of this case.

To begin with, there is no basis for an inference that the Oregon Legislature had actually declared the act with which appellant was charged so dangerous that it should be prohibited, nor would there have been any reasonable basis for such a legislative declaration, had it been made

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* The recent cases have been collected and discussed in Legislation, Federal sedition bills; Restriction in Theory and Practice, 35 Col. L. R. 917, 920, 921. For a discussion of the philosophical issues underlying these cases see the separate opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357; Chafee, Freedom of Speech, particularly Chapters I and IV; Freund, The Police Power, Sections 475-484.

in the most explicit terms. The legislative presumption to which this Court referred in the *Whitney* and *Gitlow* cases can hardly have the same force as it had in those instances, when the statute is applied to a set of facts which is clearly innocuous, and that more especially, since it is by no means clear that the Legislature ever had such state of facts in mind. All that can be said with certainty about the legislative intention is that the Legislature believed a necessity existed for punishing advocacy by words. The very fact that in 1933 the Legislature so amended the law as to make it no longer criminal merely to belong to a proscribed organization, indicates that it did not consider it necessary to continue the crime of association. While this Court is of course bound by the interpretation placed upon the law by the highest court of the State, nevertheless it does not follow that the effect to be given to a legislative presumption is the same when the meaning of the law is arrived at only by interpretation. In other words, in order that there be a presumption that the Legislature believed conditions so serious as to warrant an infringement of the right of free speech and free assembly, the statement of the legislative intention to accomplish that result must be clear on its face. Here it cannot be said that it is clear on its face that the Legislature intended to punish a man merely for participating in a meeting on the ground that the meeting had been called by an organization charged with unlawful conduct.

Moreover, even if an inference can be drawn that the Legislature really concluded that conditions were so bad as to require this result, then it is submitted there was no rational connection between the end sought to be accomplished and the means employed. This Court has never hesitated to disregard the presumption of validity arising from declarations of a legislature when the law it passed

seemed arbitrary to a majority of the court. From *Adkins* v. *Children's Hospital*, 261 U. S. 525, to *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, many laws have been declared void despite express legislative declarations as to their necessity.* Surely, if there was no reasonable basis for the legislative declaration that minimum wages were necessary in order to promote economic stability and to prevent the exploitation of women, it is difficult to see how, in the absence of extraordinary occurrences (of which there is no evidence in this case), there could be any basis for a legislative declaration that public safety required the imprisonment of all persons who participate in meetings called by the Communist Party, regardless of what takes place at the meetings.

If the conviction in this case can be sustained, then anyone who speaks at a meeting called by the Communist Party for any purpose whatsoever might likewise be convicted, provided the State in which the meeting is called happens to have a law similar to that of Oregon. Now the Communist Party is a recognized political party, with candidates for all elective offices. It has a place on the ballot in a majority of the States of the United States. Meetings of this Party are being held all over the country. The right of the Presidential candidate of that Party to speak

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* as, for instance:

Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504;
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402;
Frost Trucking Co. v. *Railroad Commission*, 271 U. S. 583;
Tyson v. *Banton*, 273 U. S. 418;
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1;
New State Ice Co. v. *Liebmann*, 285 U. S. 262;
cf. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

over the radio has been only recently sustained by the Federal Communications Commission.

In this connection it may not be amiss to point out that the Communist Party was on the ballot in the State of Oregon in the year 1932, with candidates for Presidential electors as well as for some other offices. If the position of the State in the case at bar is sound, then anyone who took part in the proceedings which led up to the placing of the Communist Party on the ballot in that year, as well as anyone who took part in any of the meetings which were called to discuss the issues of that campaign, must have been guilty under this law. That, of course, is an absurdity. If a State permits a party to have a place on its ballot how can it be heard to say that the mere association with that party can constitute a crime?

This is not a case, such as was the *Gitlow* case (268 U. S. 652), in which defendant was the author of a manifesto considered by the majority of the Court sufficiently dangerous to justify his conviction. There is no charge in the case at bar that appellant was in any way concerned with the preparation of any offensive literature whatsoever. All that appears is that he was a member of the Party and that he attended this meeting under instructions. And there is no charge that anything which occurred at the meeting was otherwise than lawful.

This case differs in another important respect from *Whitney* v. *California*, 274 U. S. 357, also, since in that case the statute punished assistance to an organization "*to* advocate * * * criminal syndicalism", not, as in the case at bar, mere assistance to an organization "*which* advocates" the prohibited doctrines. The distinction is vital. In the one case participation in the wrongful advocacy is an essential part of the crime charged; in the other it is immaterial. Miss Whitney's conviction was

sustained because she participated in a meeting which itself advocated prohibited doctrines; appellant was convicted for participation in a meeting which the State Supreme Court ruled was not so charged (R. 32). There can be no basis for punishing a person merely for attendance at or participation in a meeting, when it is not charged that any prohibited doctrines were being advocated at the meeting he attended.

For these reasons it is submitted that the statute as applied in this case is unconstitutional, because it punishes a person for acts which from no point of view can reasonably be said themselves to produce danger to the State. The acts as such were harmless. No situation existed from which an inference could possibly be drawn that danger to the State might result merely because the meeting had been called by the Communist Party. No other facts exists in the case of any weight at all. A law which punishes a person for participating in a peaceful meeting and speaking at it, merely because the meeting is called by the Communist Party, is arbitrary and unreasonable and in violation of the constitutional guaranty of due process. The conviction of this appellant must be reversed, therefore, and the indictment dismissed, because no wrongful act was charged and proved.

Fiske v. *Kansas,* 274 U. S. 380.

Point II.

The trial court erred in failing to grant appellant's motion for a directed verdict on the ground that there was no evidence sufficient to permit a finding of guilty.

In view of the foregoing analysis of the charge against appellant, it is submitted that under the decisions of this Court in *Stromberg* v. *California,* 283 U. S. 359, and in

Fiske v. *Kansas*, 274 U. S. 380, appellant was entitled to have granted the motion for a directed verdict which he made at the close of the entire case.

Respectfully submitted,

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APPENDIX.

The criminal syndicalism law, Sections 14-3110, 14-3111 and 14-3112, Oregon Code 1930, as amended by chapter 459, Oregon Laws, 1933:

"SECTION 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"SECTION 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"SECTION 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the State penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine."

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 123

DIRK DEJONGE,
Appellant,
v.
THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon.

APPELLEE'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 123

DIRK DEJONGE,
Appellant,
v.
THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon.

APPELLEE'S BRIEF

STATEMENT

Appellant was convicted for violation of the Oregon Criminal Syndicalism Act. From such conviction he appealed to the Supreme Court of the State of Oregon, which court affirmed the judgment of the lower court, and subsequent thereto denied a petition for rehearing in the same. The opinion of the Supreme Court of Oregon is found in 152 Ore. 315, 51 Pac. (2nd) 674, and is copied in the transcript of record in this case, beginning at page 20.

The appellant has appealed to this Court, contending as follows:

1. That the law is unconstitutional because, as construed by the Supreme Court of the state, it punishes participation in a lawful meeting merely because the meeting was called by a group which the jury found elsewhere advocated the prescribed doctrines.

2. That appellant was entitled to a directed verdict.

POINT I

The Oregon Criminal Syndicalism Act as applied to this case is definite and certain, and it follows, then, that it is constitutional.

Whitney v. California, 274 U.S. 357, 368.
Connally v. General Construction Co., 269 U.S. 385, 391.
Miller v. Strahl, 239 U.S. 426, 434.
Nash v. United States, 229 U.S. 373, 377.
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State v. Dingman, 37 Id. 253, 265, 219 Pac. 760.
Berg v. State, 29 Ok. Cr. Rep. 112, 121, 233 Pac. 497.
State v. Worker's Socialist Pub. Co., et al, 150 Minn. 406, 407, 185 N.W. 931.

ARGUMENT

The Oregon Criminal Syndicalism Law, Sections 14-3110, 14-3111 and 14-3112, Oregon Code, 1930, as amended by Chapter 459, Oregon Laws, 1933, reads thus

"Section 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"Section 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"Section 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates,

sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine or criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine."

As was said by this Court, speaking through Mr. Justice Sutherland, in the case of *Connally v. General Construction Co.*, 269 U.S. 385, 391:

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statute involved were upheld; in others declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." * * *

or,

"a well settled common law meaning, notwithstanding an element of degree in the definition as to

which estimates might differ." * * * or as broadly stated by Mr. Chief Justice White, in the case of *United States v. Cohn Grocery Company*, 255 U.S. 81, 92 "* * * that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."

In the case of *Whitney v. California*, 274 U.S. 357, the Court had under consideration the Constitutionality of the California Criminal Syndicalism Act, the appellant therein contending that the Act was repugnant to the due process clause by reason of vagueness and uncertainty of definition. This court, speaking through Mr. Justice Sanford, said on page 368:

"It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221; and *United States v. Cohn Grocery*, 255 U.S. 81, 89, because not fixing an ascertainable standard of guilt. The language of Sec. 2, subd. 4, of the Act, under which the plaintiff in error was convicted, is clear; the definition of 'Criminal syndicalism' specific.

"The Act plainly, meets the essential requirement af due process that a penal statute be 'sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' *Connally v. General Construction Co.*, 269 U.S. 385, 391. And see *United States v. Brewer*, 139 U.S. 278, 288; *Chicago, etc., Railway v. Dey*, (C. C.), 35 Fed. 866, 876; *Tozier v. United States* (C. C.) 52 Fed. 917, 919. In *Omaechevarria v. Idaho*,

246 US. 343, 348, in which it was held that a criminal statute prohibiting the grazing of sheep on any 'range' previously occupied by cattle 'in the usual and customary use' thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a 'range' or to determine the length of time necessary to constitute a prior occupation a 'usual' one this Court said: 'Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty in application to necessarily varying facts than has been repeatedly sanctioned by this court. *Nash v. United States*, 229 U.S. 373, 377; *Miller v. Strahl*, 239 U.S. 426, 434." So, as applied here, the Syndicalism Act required of the defendent no 'prophetic' understanding of its meaning.

"And similar Criminal Syndicalism statutes of other states, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. *State v. Hennessy*, 114 Wash. 351, 364; *State v. Laundy*, 103 Ore. 443, 460; *People v. Ruthenberg*, 229 Mich. 315, 325. And see *Fox v. Washington*, 236 U.S. 273, 277; *People v. Steelik*, 187 Cal. 361, 372; *People v. Lloyd*, 304 Ill. 23, 24."

In the case of *Waters-Pierce Oil Co. v Texas* (No. 1), 212 U.S. 86, 108, this court had under consideration certain anti trust laws of Texas, it being contended that because of the vagueness and the indefiniteness of certain prohibitive acts that the said acts were not constitutional as they deprived one of due process of law, the objection being that the Texas statute denounced contracts and arrangements reasonably calculated to fix and regulate the price of commodities, etc. It was insisted that this law was so indefinite that no one could tell what acts were embraced within its pro-

visions. It was held therein that this was a sufficiently definite statute to denounce restraint of trade.

In the case of *Miller v. Strahl*, 239 U.S. 426, this court had under consideration that part of a Nebraska statute which provided, among other things:

> "* * * It shall be the duty of each proprietor, or keeper of such hotel or lodging house in case of fire therein to give notice of same to all guests and inmates thereof at once and *to do all in their power* to save such guests and inmates."

This statute was attacked on the ground that it contravenes the Constitution of the United States, because it fails to prescribe any fixed rule of conduct. The argument was that the requirement to do all in one's power fails to inform a man of ordinary intelligence what he must or must not do under given circumstances. This court said on page 434:

> "Rules of conduct must necessarily be expressed in general terms and dependent upon their application upon circumstances, and circumstances vary. It may be true, as counsel says, that 'men are differently constituted, some being abject cowards, and few only are heroes,' and that the brains of some people work 'rapidly and normally in the face of danger, while other people lose all control over their actions.' It is manifest that rules could not be prescribed to meet these varying qualities. And all must be brought to judgment, and what better test could be devised than the doing 'all in one's power' as determined by the circumstances? The case therefore falls under the rule of *Nash v. United States*, 229 U.S. 373, and not under the rule of *International Harvester Co. v. Missouri*, 243 U.S. 199."

In the case of *Nash v. United States*, 229 U.S. 373, objection was made to the act commonly known as the Sherman Act, which denounces conspiracy in restraint

of trade and conspiracy to monopolize trade, on the ground that the statute contains in its definition an element of degree as to which estimates may differ with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men, and this court, speaking through Mr. Justice Holmes, said in part as follows (p. 377):

"But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Commonwealth v. Pierce*, 138 Mass. 165, 178. *Commonwealth v. Chance*, 174 Mass. 245, 252. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' I East P.C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See *Reg. v. Desmond*, and other illustrations in Stephens, Dig. Crim. Law, art. 223, 1st ed., p. 146. If he did no more than drive negligently through a street he might get off with manslaughter or less. *Reg. v. Swindall*, 2 C. & K. 230; *Reg. v. Burton*, 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See The Germanic, 196 U.S. 589, 596. But without further argument, the case is very

nearly disposed of by *Waters-Pierce Oil Co. v. Texas* No. 1), 212 U.S. 86, 109, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of the opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Statutes similar in nature to the Oregon Criminal Syndicalism Act, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness.

In the case of *State v. Hennessy*, 114 Wash., 351, the Court held the following statute not void for indefiniteness:

"Section 1. Whoever shall

"(1) Advocate, advise, teach or justify crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or

"(2) Print, publish, edit, issue or knowingly sell, circulate, distribute or display any book, pamphlet, paper, handbill, document, or written or printed matter of any form, advocating, advising, teaching or justifying crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or

"(3) Organize or help to organize, give aid to, be a member of or voluntarily assemble with any group of persons formed to advocate, advise or teach crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change.

"Shall be guilty of a felony."

In *State v. Laundy*, 103 Ore. 443, the Court had under consideration that part of an Oregon statute which provided, among other things:

"Any person who * * * helps to organize or become a member of, or voluntarily assembles with any society or assemblage of persons which teaches, advocates or affirmatively suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime of unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony."

This statute was attacked upon the ground that it was too vague, indefinite and uncertain. This court said, on page 463:

"The defendant insists that the statute is void because it is too vague, indefinite and uncertain, and that the indictment is likewise bad because of indefiniteness. The state Constitution, Article I, Section 11, prescribes that the accused shall have the right 'to demand the nature and cause of the accusation against him.' The Code, Section 1437, Or. L., commands that the indictment shall contain:

"'a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.'

"Another section of the Code, Section 1440, Or. L., declares that the indictment must be direct and certain as it regards—'the crime charged; and, the particular circumstances of the crime charged when they are necessary to constitute a complete crime.'

"The Code, Section 1448, Or. L., further provides that the indictment is sufficient if it can be understood therefrom—

"'that the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of commoun understanding to know what is intended.'

"The crime of which the defendant is accused is a statutory offense. The statute declares that any person who 'helps to organize or become (s) a member of, or voluntarily assembles with any society or assemblage of persons" which teaches the prohibited doctrines shall be guilty of criminal syndicalism. The statute specifies the acts of commission which will effect the crime. The statute informs every person subject to the jurisdiction of the courts of this state that he commits the crime of criminal syndicalism if he (1) helps to organize; or (2) if he becomes a member of; or (3) if he voluntarily assembles with any society or assemblage of persons which teaches the inhibited doctrines. The statute describes the acts which constitute the crime. The indictment describes the acts with which the defendant is charged in the same language which is employed in the statute to define the prohibited acts. The indictment contains every element of the complete offense as that offense is defined by the statute. The state is not required to plead the evidence relied upon to prove the acts alleged to have been committed by the defendant. The indictment advises the defendant not only of the nature but also of the cause of the accusation made against him. The language employed is such as to enable a person of common understanding to know what is intended. *The statute defines the kind of societies and assemblages which no person can organize or help to organize or become a member of or assemble with.* (Italics ours.) The indictment describes the Industrial Workers of the World in the same language which the statute uses to describe unlawful societies. Words of description used in the indictment are just as definite and certain as are the words of description used in the statute; and assuredly the words of the statute are sufficiently definite to describe the acts intended to be prohibited and the kind of societies and assemblages intended to be banned: *People v. Malley* (Cal. App.), 194 Pac. 50; *State v. Quinlan*, 86 N.J. L. 120, 123 (91 Atl. 111); *State v. Rose*, 147 La. 243 (84 South. 643, 646); *State v. Hen-*

nessy, 114 Wash. 351 (195 Pac. 211, 215); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86 (53 L. Ed. 417, 29 Sup. Ct. Rep. 220)."

In *People v. Ruthenberg,* 229 Mich. 315, the Court at page 325, said:

"It is claimed the provisions of the statute do not fix an ascertainable standard of guilt and are not adequate to inform persons, accused of violation thereof, of the nature and cause of accusation against them. It is said in support of this that the term 'sabotage' is subject to a variety of innocent meanings, and the term 'violence' is not necessarily limited to physical or criminal violence. The naivette of this should make a communist smile. One need read but little to discover what the terms sabotage and violence mean with reference to industrial or political agenda advocated by radicals. The term sabotage is so well understood by communists as to be employed in the theses and resolutions adopted at the third world congress of the Communist International without any explanation to exclude possible innocent meaning. Dictionaries have explained the meaning of sabotage for many years. Sabotage has had a well understood meaning ever since French industrial workers threw their sabots, or wooden shoes, into machinery. It signifies a willful act of destruction, and has so been understood by writers for many years. Non-criminal sabotage, such as loafing on the job, of course, does not fall within the act. The legislature evidently intended to denounce the 'revolutionary notion' of sabotage, as mentioned by Austin Lewis in the 'Militant proletaria.' (1911.)

"Sabotage appears as a disagreeable incident in a revolutionary campaign, unjustifiable under conditions which exclude the revolutionary notion, but perfectly justifiable in terms of the revolutoin."

"In law, the term 'violence' means the unlawful exercise of physical force, or intimidation by its exhibition and threat of employment. The meaning of

the term is not uncertain. See *People v. Lloyd, supra.* The statute and information are not void for uncertainty. *People v. Steelik, supra.*"

In *People v. Steelik,* 187 Cal. 361, 373, the Court declared the California Criminal Syndicalism Act definite and certain.

In *People v. Lloyd,* 304 Ill. 23, the Court, in construing the Criminal Syndicalism Act of Illinois, said on page 35:

"Plaintiffs in error further contend that because of uncertainties and ambiguities appearing in the statute, they are deprived of the right to be informed of the nature and cause of the accusations against them, and that the act is therefore repugnant to Section 9 of Article 2 of the State Constitution, and that they are deprived of their liberty and property without due process of law, thereby making the act repugnant to Section 2 of Article 2 of the State Constitution and the Fourteenth Amendment to the Constitution of the United States. We have already said that there are no substantial uncertainties or ambiguities in the language of the act and that the words used in it, taken in their ordinary sense, clearly express the legislative intent. There is no organic rule of law or rule of sound public policy that requires the legislature to define the meanings of English words in common and daily use. (*State v. Quinlan,* 86 N.J. L. 120, 91 Atl. 111). Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requisition is satisfied. Due process of law is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. (*Caldwell v. State,* 137 U.S. 692, 11 Sup. Ct. 224; *Burdick v. People,* 149 Ill. 600.) These objections to the validity of the statute are without merit. See *State v. Moilen* (Minn.) 167 N.W. 345, 1 A.L.R. 331, and note."

In *State v. Dingman*, 37 Ida. 253, the Court, in construing the Criminal Syndicalism Act of Idaho, said on page 265:

"The legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is unreasonably calculated to produce, a certain defined or described result, or it may group together various means by which the end may be accomplished and make any one of such means an offense when done to attain the object denounced by the statute. In the absence of a provision to the contrary, a statute may punish an offense by giving it a name known to the common law, without further defining it, and the common-law definition will be applied. In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and a liberal effect is always to be given to the legislative intent when possible * * * A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary understanding an adequate description of the evil intended to be prohibited. (16 C.J. 67, sec. 28; *Stewart v. State*, 4 Okl. Cr. 564, 109 Pac. 243, 32 L.R.A., N.S. 505; *State v. Lawrence*, 9 Okl. Cr. 16, 130 Pac. 508; *State v. Fox*, 71 Wash. 185, 127 Pac. 1111; *State v. Lowery*, 104 Wash. 520, 177 Pac. 355; *State v. Hennessy*, 114 Wash., 351, 195 Pac. 211; *People v. Malley*, 49 Cal. App. 497, 194 Pac. 48; *People v. Steelik*, 187 Cal. 361, 203 Pac. 78; *People v. Lesse*, 52 Cal. App. 280, 199 Pac. 46; *State v. Laundy*, 103 Or. 443, 204 Pac. 958, 206 Pac. 290.)

"We think the statute and the information based thereon are not vulnerable to the attack that the language is so indefinite and uncertain that an individual may not know with reasonable certainty whether his act is in violation of the same."

In *Berg v. State*, 29 Okl. Cr. Rep. 112, the Court, in construing the Criminal Syndicalism Act of Oklahoma, said on page 121:

> "It is also contended that the law in question is unconstitutional for the reason that it does not clearly and explicitly set out the acts which constitute the offense. This objection to the constitutionality of the act has been generally raised in the cases heretofore mentioned and the objection held not to be sound. The words used in the definition of the offenses, which are not defined in the act itself, have well-recognized meanings and the language used fairly defines the crime created by the statute. *People v. Steelik, supra; People v. Malley, supra; State v. Workers Soc. Pub. Co.*, 150 Minn. 406, 185 N.W. 931; *State v. Hennessy, supra.*"

In *State v. Worker's Socialist Pub. Co., et al*, 150 Minn. 406, the Court, in construing the Criminal Syndicalism Act of Minnesota, said on page 407:

> "Defendants contend that the statute is so uncertain and indefinite that it is in violation of the provisions of our Constitution that, in any criminal prosecution, the accused shall be entitled to know the nature and cause of the accusation against him. Const. Minn. Art. 1, Sec. 6. The statute was before the court in *State v. Moilen*, 140 Minn. 112, 167 N.W. 345, 1 A.L.R. 331. Its constitutionality was there sustained as against attack made on other grounds. We think it must also be sustained as against the contentions of the defendants. It forbids any one to teach the duty, necessity or propriety of crime, sabotage and other unlawful methods of terrorism as a means of accomplishing industrial or political ends. These words need no further definition. The language used seems to us to fairly and plainly define the crime which the statute creates."

In the case of *Stromberg v. California,* 283 U.S. 359, and which is the case upon which appellant strongly relies in his argument that the Oregon Criminal Syndicalism Act is void since it makes possible the condemnation of a wholly lawful act, this court had under consideration that part of the California Criminal Syndicalism Act, which provided, among other things:

> "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

This Court, in construing the first clause of this statute, stated as follows:

> "The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag 'as a sign, symbol or emblem of opposition to organized government,' and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the state could not constitutionally prohibit. Thus it was said that the clause 'might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations.' The maintenance of the opportunity for

> free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside."

The Stromberg case is to be differentiated from the case at hand, in that in that case the first clause of the statute was construed by the court as being so vague and indefinite that it might be considered as embracing conduct which the state could not constitutionally prohibit, while in the case at hand the statute fixes an ascertainable standard of guilt and it cannot be reasonably construed, as contended by appellant, to embrace conduct which the state could not constitutionally prohibit. In the case at hand, the crime of which the appellant is accused, is a statutory offense. The Oregon Criminal Syndicalism Act declares, among other things, that any person who presides at, conducts or assists in conducting any assemblage of persons, or any organization which teaches the prohibited doctrines shall be guilty of criminal syndicalism. The statute clearly specifies the acts of commission which will effect the crime. The statute defines the kind of assemblages and organizations which no person can preside at, conduct or assist in conducting. The statute is sufficiently explicit to inform every person subject to the jurisdiction of the courts of Oregon that he commits the crime of criminal syndicalism, and not

otherwise, if he presides at, conducts or assists in conducting a meeting of an organization or group which teaches or advocates criminal syndicalism or sabotage.

Under this construction the statute does not prohibit peaceful and orderly opposition to government by peaceful means and within constitutional limitations, but only prohibits such conduct as may tend to incite to crime, disturb the public peace, or endanger the foundation of organized government and threaten its overthrow by unlawful means. That the state may, in the exercise of its police powers, prohibit such conduct, is not open to question, as can be readily seen from the reasoning in Point II of this brief.

POINT II

The Oregon Criminal Syndicalism Act as applied to this case does not violate the constitutional right of freedom of speech nor the constitutional right of freedom of assembly.

Herndon v. Georgia, 295 U.S. 441.
Stromberg v. California, 283 U.S. 359, 368.
Whitney v. California, 274 U.S. 357, 371.
Gitlow v. New York, 268 U.S. 652, 669.
People v. Ruthenberg, 229 Mich. 315 (201 N.W. 358).
State v. Boloff, 138 Ore. 568, 623 (4 Pac. (2nd) 775).
State v. Laundy, 103 Ore. 443, 462 (204 Pac. 958).

ARGUMENT

That the right of free speech and assembly is not an absolute one and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending

to incite to crime, disturb the public peace, or endanger the foundation of organized government and threaten its overthrow by unalwful means is not open to question. *Stromberg v. California*, 283 U.S. 359, 368; *Whitney v. California*, 274 U.S. 357, 371; *Gitlow v. New York*, 268 U.S. 652, 666-668.

The appellant contends that the statute as construed and applied in this case is unreasonable and arbitrary and therefore infringes upon his right of freedom of speech and assembly. This contention is without merit.

In the case of *Gitlow v. New York*, *supra*, the Court had under consideration a New York statute punishing those who advocate, advise or teach the duty, necessity or propriety of overthrowing organized government by force, violence, or any unlawful means, or who print, publish, or knowingly circulate any book, paper, etc., advocating, advising or teaching the doctrine that organized government should be so overthrown. The defendant was charged with violating said Act. The evidence showed that the defendant was a member of the Left Wing Sector of the Socialist Party, a national organization; that such society at a conference of its delegates adopted a "Manifesto," which advocated and urged in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government; and that the defendant advocated the adoption of such program and was responsible for the publication and circulation of such Manifesto. There was no evidence of any affect resulting from publication and circulation of the same.

The defendant was convicted, and appealed to this Court, contending, among other things, that the statute, as construed and applied in this case by the State courts, deprived him of his liberty of expression in

violation of the due process clause of the Fourteenth Amendment, in that while the liberty of expression is not absolute, it may be restrained only in circumstances where its exercise bears a casual relation with some substantive evil, consumated, attempted or likely.

The court, in holding the Act as applied to this case constitutional, said on page 669:

"That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment suppress the threatened danger in its incipiency. . . . In other words, when the legislative body has determined generally in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming

within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition. . . . And the general statement in the Schenck case (p. 52) that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,'—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

The ruling in the Gitlow case was later reaffirmed in the case of *Whitney v. United States, supra.* In that case the court had under consideration that part of the California Criminal Syndicalism Act which provided among other things:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property) or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change.

"Section 2. Any person who: * * * 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism * * *

"Is guilty of a felony and punishable by imprisonment."

The defendant was charged with violating said act. The evidence showed that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this society was organized to advocate, teach, aid or abet criminal syndicalism as defined by the act. The defendant was convicted and upon affirmance of conviction in the lower court, appealed to this court contending, among other things, that the California Syndic lism Act as applied in this case was repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association. This court, through Mr. Justice Sanford, said on page 371:

"Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridles license giving immunity for every possible use of langauge and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse theis freedom by utterances inimical to the public welfare, tending to incite to crime; disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*, 268 U.S. 652, 666-668, and cases cited.

"By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such dangers to the public peace

and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U.S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Great Northern Railway v. Clara City*, 246 U.S. 434, 439.

"The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See *People v. Steelik*, *supra*, 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and act of individuals, is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State * * *"

It is to be observed that the contention of the appellant in the case at hand is similar to that made in the Whitney case. It is further to be observed that the question in both these cases is substantially the same —in the Whitney case the question before the court being whether an act which makes it a crime to be a member of or to assist in organizing an organization which taught and advocated criminal syndicalism and sabotage is repugnant to the due process clause of the Fourteenth Amendment as a restraint of the rights of free speech and assembly, while in the case at hand the question before the court is whether an act which

makes it a crime to conduct or to assist in conducting a meeting of an organization which teaches and advocates criminal syndicalism and sabotage is repugnant to the due process clause as a restraint of the rights of free speech and assembly.

And in the case of *Herndon v. Georgia*, 295 U.S. 441, this court had under consideration a Georgia statute which makes it a crime to incite insurrection. The statute provided as follows:

> "Section 55. Penal Code of Georgia: 'Insurrection shall consist in any combine resistance to the lawful authority of the state, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence.'
>
> "Section 56. Penal Code of Georgia: 'Any attempt by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state shall constitute an attempt to incite insurrection.'"

In passing upon whether this act contravenes the Fourteenth Amendment, this court, speaking through Mr. Justice Sutherland, quotes with approval the language of the Supreme Court of Georgia in *Carr v. State*, 176 Ga. 747 (169 S.E. 201), in which the Georgia court construed Section 56 of the Penal Code of Georgia, above quoted as follows:

> "'It (the state) can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment, suppress the threatened danger in its incipiency * * * Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, without waiting until there

is a present and immenent danger of the success of the plant advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.'

"The language contained in the subquotation is taken from *People v. Lloyd*, 304 Ill. 23, 35; 136 N.E. 505, and is quoted with approval by this court in *Gitlow v. New York*, 268 U.S. 652, 669."

Statutes similar in nature to the Oregon Criminal Syndicalism Act have been held by the state courts not to violate the constitutional right of freedom of speech and assembly. Although there are innumerable decisions to be cited wherein state courts have so held, for the purposes of this brief only three such decisions will be discussed herein. They are *People v. Ruthenberg*, 229 Mich. 315, 201 N.W. 358; *State v. Boloff*, 138 Ore. 568, 4 Pac. (2nd) 775, and *State v. Laundy*, 103 Ore. 443, 204 Pac. 950, which cases, through clear reasoning and ample citation of authority, hold that their Criminal Syndicalism Acts do not infringe upon the freedom of speech and assembly.

In the case of *People v. Ruthenberg, supra*, the defendant was indicted for violation of the State Criminal Syndicalism Act by voluntarily assembling with the Communist Party of America, which party was formed to advocate the doctrines of Criminal Syndicalism. The evidence seemed to indicate that the defendant, as a member of the Central Executive Committee of the Communist Party of America, an organization formed to advocate and teach the doctrines of Criminal Syndicalism, by virtue of his office attended the convention of that organization as a delegate. Defendant was convicted, and upon appeal contended, among other things, that the statute under which he

was convicted was unconstitutional in that it deprived him of the right of freedom of speech and assembly. In passing upon this point, the Court said in part, as follows:

> "Does this statute contravene the right of the people to peaceably assemble? To so hold would require us to say that it is violative of the Constitution to make it a crime for one in sympathy with and on his own volition to join in an assemblage of persons formed to teach or advocate crime, sabotage, violence, or other unlawful methods of terrorism, as a means of accomplishing industrial or political reform. We cannot make any such holding.
>
> "Does the statute prevent freedom of speech? This statute reaches an abuse of the right to freely speak, write, and publish sentiments, and is squarely within the accountability allowed to be exacted in the very provision invoked. This statute does not restrain or abridge liberty of speech."

In the case of *State v. Boloff, supra,* the Court had under consideration that part of the Oregon Criminal Syndicalism Act, which provides, among other things:

> "Any person * * * who shall be or become a member of, or organize or help to organize, or solicit or accept any person to become a member of, or voluntarily assemble with any society or assemblage of persons which teaches, advocates, or affirmatively suggests the doctrine or criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony. * * *"

The defendant was charged with violating said Act by, among other things, being a member of the Communist Party, an organization which taught and advo-

cated Criminal Syndicalism and Sabotage. The evidence showed that the defendant was a member of the Communist Party and that the Communist Party taught and advocated such prohibited doctrines. Defendant was convicted and upon appeal contended that the statute under which he was convicted was unconstitutional, in that it deprived him of the right of freedom of speech and assembly. In passing upon this point the Court said, in part, on page 623, as follows:

> "The problem now arises whether legislation of this kind based upon the above principles is violative of the sections of the Federal and Oregon Constitutions which grant the right of freedom of speech and of peaceable assembly. The clear reasoning and ample citation of authority in Mr. Justice Harris' decision in *State v. Laundy, supra*, ought to convince any inquiring mind that no conflict exists between this act and those constitutional provisions. The decision just mentioned states: 'The Syndicalism Act does not violate the constitutional right to speak freely nor the constitutional right to assemble peaceably.' In addition to the numerous authorities cited by Mr. Justice Harris supporting the validity of such statutes will be found collected in the following compendiums many additional decisions to like effect: 20 A.L.R. 1535, I A.L.R. 336, 19 Cal. Law Rev. 64, and 76 Penn. Law Rev. 198. And see also the cases cited in *Berg v. State*, 29 Okl. Cr. 112 (233 p. 497.). * * *"

It may not be amiss to point out that in this case the Court held ineffective somewhat the identical argument that has been submitted by counsel in the case at hand, stating on page 604:

> "* * * In *Whitney v. California*, 274 U.S. 357, the identical argument that counsel submits to us was carefully considered and held ineffective, as was also done in *Commonwealth v. Widovich*, 295 Pa. 311 (145 Atl. 295). The defendant rests his ar-

gument entirely upon the remarks of Mr. Justice Brandeis in his specially-concurring decision in *Whitney v. California, supra,* wherein he held that the right of free speech and of assembly can be restricted only when the limitation is necessary to protect the State from imminent destruction or from serious injury. He, however, found that the conduct of Miss Whitney and her associates threatened danger to the state in such an imminent and serious manner that the application of the Act to her case did not violate any safeguards guaranteed to her by the Fourteenth Amendment. He also pointed out that if the defendant believed that the application of the Act to her conduct violated any provisions of the Fourteenth Amendment, due to the absence of imminent threats of danger to the State, she could have requested special findings from the jury. In *Schenck v. United States,* 249 U.S. 47 (30 S. Ct. 247, 63 L. Ed. 470), the court pointed out:

"'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'"

In the case of *State v. Laundy, supra,* referred to in the case of *State v. Boloff, supra,* the defendant was charged with the violation of the Oregon Criminal Syndicalism Act by helping to organize, becoming a member of and voluntarily assembling with the Industrial Workers of the World, which organization taught and advocated the doctrine of criminal syndicalism and sabotage.

The evidence in the case seemed to indicate that the defendant was a member of the Industrial Workers of the World and that that organization taught and advocate the doctrine of criminal syndicalism and sabotage.

The evidence further seemed to indicate that the defendant voluntarily assembled with such organization.

There was no evidence of any advocation of criminal syndicalism or sabotage at such meeting. The defendant was convicted and upon appeal contended that the criminal syndicalism statute was unconstitutional for the reason that it infringes upon the right of free speech and encroaches upon the right of assemblage. In passing upon this point the court held that the syndicalism act did not violate the constitutional right to speak freely nor the constitutional right to assenble.

By enacting the present statute, the State has determined through its legislative body, that to preside at, conduct, or assist in conducting a meeting of an organization which has as its objective the advocacy, teaching or affirmative suggestion of crime, sabotage or violence as a means of affecting a change or revolution in industry or government, involves such dangers to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in the validity of this statute. *Whitney v. California, supra; Mugler v. Kansas*, 123 U.S. 623, 661. The Courts will not pronounce an act of the legislature unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Whitney v. California, supra; Great Northern Railway v. Clara City*, 246 U.S. 434, 439. If the Act does not invade the constitutional rights of the citizen, then the statute must be sustained and effect must be yielded to it by the courts, even though the latter may seriously disagree with the wisdom of such enactment. *Fox v. Washington*, 236 U.S. 273, 278; *State v. Boloff*, 138 Ore. 568, 611.

The evidence in this case showed that the Communist Party teaches and advocates criminal syndicalism

and sabotage as a means of affecting a change or revolution in industry or government. That such teaching and advocation present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is not open to question. *Gitlow v. New York, supra; Whitney v. California, supra, and Herndon v. Georgia, supra.* Such teaching and advocation, by their very nature, involve danger to public peace and to the security of the state, for they threaten breaches of the peace and ultimate revolution.

Legislation of the type before us was enacted, not for the purpose of denying to anyone the right of teaching socialism, communism, or any other form of social or economic compact, but for the exclusive purpose of preventing the advocation or use of violence by, among other things, forbidding anyone to preside at, conduct or assist in conducting a meeting of an organization which teaches it. Laws of this type are founded upon the principle that the moron, especially those who are class conscious, and who believe that men in high places got there through imposition upon the toilers, are likely to translate into action the words of their voluble leaders. The will of the schemer is often carried out by the acts of the unthinking. *State v. Boloff, supra,* 622.

In passing this Act the Oregon legislature evidently deemed it necessary to put a stop to activities which would naturally result in crimes against persons and property. Such a law directly or indirectly accomplishes the object of preventing the advocacy, teaching or affirmative suggestion of criminal syndicalism and sabotage and the object of curtailing the activities of an organization which has such a program as it objective. By making it a crime to preside at, conduct, or assist in conducting a meeting of the Communist Party, meetings of such an organization are prevented.

By preventing such meetings, the opportunity of such organization to further its activities and the advocation of criminal syndicalism and sabotage is greatly lessened, for it prevents such a society, among other things, from having the opportunity before a large group of disseminating its propaganda, or selling its literature or soliciting membership in its organization. That the main purpose of the Communist Party in holding its meeting is to disseminate its propaganda, to sell its literature and to solicit membership in its organization can be clearly seen from the facts in this case.

Activities of the Young Communist League were discussed at some length at the meeting (8). Relation of various police raids to the longshoremen's strike and the Communist movement were discussed there (8). Everyone at the meeting was urged to be present at the street meeting of the Communist Party to be held at Fourth and Alder Streets the following evening to show their defiance to local police authorities and to assist the Communist Party in their revolutionary tactics (9). Communist literature was sold at the meeting and the people present there were urged to purchase the same (9). New members in the Communist Party were solicited there and everybody at the meeting was urged to do more work in getting more members for that party (9).

From the above reasoning it cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, makes it a crime for anyone to preside at, conduct or assist in conducting a meeting of an organization which has as its objective the advocacy, teaching or affirmative suggestion of criminal syndicalism and sabotage.

Even assuming that the ruling in *Schenck v. United States*, 249 U.S. 47, that the right of freedom of speech

and assembly can be restricted only when the limitation is necessary to protect the State from imminent destruction or from serious injury applies to the facts in the case at bar, then it is contended that the appellant, by his failure to raise such question at any time prior to this appeal, is now precluded from so contending. *Whitney v. California, supra,* page 379. Furthermore, there was evidence in the case at bar from which the court or jury might have found that there was a clear and present danger of serious evil to the State of Oregon by the conduct of the appellant and the Communist Party, whose meeting he assisted in conducting and of which organization he was a member. The appellant urged everyone present at the meeting to do more work in getting more members for the Communist Party (9), solicitation of members in such organization being a crime under Section 14-3112, Oregon Code, 1930, as amended by Chapter 459, General Laws of Oregon for 1933. He also urged those at the meeting to be present at the street meeting of the Communist Party to be held the following evening to show their defiance to local police authorities and to assist the Communist Party in their revolutionary tactics (9). To urge defiance to local constituted authority is certainly advocating a crime. The phrase "revolutionary tactics" must be construed in the light of statements from Communist literature as illegal methods. That some of the official literature of the Communist Party advocated present and immediate mass action can be readily seen from a perusal of the excerpts from the mimeographed circular of December 26, 1933, issued by the agitation and propaganda Department of District 12 of the Communist Party of the United States, which includes Oregon (13), and from a perusal of the excerpts from "Why Communism" (14).

We respectfully submit that the opinion of the Oregon Supreme Court was proper, and should be affirmed by this court.

STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT ON APPEAL

The appeal does not involve a substantial Federal question.

No substantial Federal question is raised if the Supreme Court has previously passed upon the contention; for the Supreme Court of the United States has decided that no substantial Federal question forming a basis for review by the Supreme Court of the United States of a State Court, is presented by claiming that a constitutional right has been invaded where the question has been settled by previous decisions of the Supreme Court of the United States.

Utley v. St. Petersburg, 292 U.S. 106, 109, 112: 78 L. Ed. 1155, 1158, 1159.
Levering & G. Co. v. Morris, 289 U.S. 103, 108; 77 L. Ed. 1062, 1066.
Minneapolis & St. Paul, Etc. Co., v. C. L. Merrick Co., 254 U.S. 376; 65 L. Ed. 312.

In *Gitlow v. New York*, *supra*, fully discussed on pages 18, 19 and 20 of this brief, and in *Whitney v. California*, *supra*, fully discussed on pages 4, 5, 20, 21, 22 and 23 of this brief, the questions and principle involved in those cases were the same questions and principles involved in the instant case; and therefore the questions have been previously decided by the Supreme Court of the United States with the result that a substantial Federal question is not involved in the instant case.

The appellant relies on *Stromberg v. California*, *supra*, and *Fiske v. Kansas*, 274 U.S. 380, to sustain

jurisdiction. That the ruling in the Stromberg case is not applicable to the case at hand can be readily seen from the analysis of the same made on pages 15, 16 and 17 of this brief.

In *Fiske v. Kansas*, *supra*, this court reversed a judgment of conviction, previously sustained by the Supreme Court of Kansas, of a member of the Industrial Workers of the World because the proof failed to show that his organization contemplated the use of violence in its program looking to a change in industry. The facts in that case are to be differentiated from those in the Gitlow case, in the Whitney case, or in the case at hand, in that the language used in the Fiske case is essentially different from the language used in the other cases mentioned or in the case at bar. In the Fiske case there was no evidence showing an advocation of the overthrow of the existing industrial or political conditions by force, violence or unlawful means, while in the Gitlow case, in the Whitney case, and in the present case the record was replete with evidence showing an advocation of the overthrow of the existing industrial or political conditions by force, violence or unlawful means.

We respectfully submit that the record does not present a substantially Federal question.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 123.—October Term, 1936.

Dirk De Jonge, Appellant, *vs.* The State of Oregon. } Appeal from the Supreme Court of the State of Oregon.

[January 4, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, Dirk De Jonge, was indicted in Multnomah County, Oregon, for violation of the Criminal Syndicalism Law of that State.[1] The Act, which we set forth in the margin, defines "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution". With this preliminary definition the Act proceeds to describe a number of offenses, embracing the teaching of criminal syndicalism, the printing or distribution of books, pamphlets, etc., advocating that doctrine, the organization of a society or as-

[1] Oregon Code, 1930, sections 14-3110-3112—as amended by chapter 459, Oregon Laws, 1933:

"Section 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"Section 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"Section 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine".

semblage which advocates it, and presiding at or assisting in conducting a meeting of such an organization, society or group. The prohibited acts are made felonies, punishable by imprisonment for not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both.

We are concerned with but one of the described offenses and with the validity of the statute in this particular application. The charge is that appellant assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The defense was that the meeting was public and orderly and was held for a lawful purpose; that while it was held under the auspices of the Communist Party, neither criminal syndicalism nor any unlawful conduct was taught or advocated at the meeting either by appellant or by others. Appellant moved for a direction of acquittal, contending that the statute as applied to him, for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated, violated the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This contention was overruled. Appellant was found guilty as charged and was sentenced to imprisonment for seven years. The judgment was affirmed by the Supreme Court of the State which considered the constitutional question and sustained the statute as thus applied. 152 Ore. 515. The case comes here on appeal.

The record does not present the evidence adduced at the trial. The parties have substituted a stipulation of facts, which was made and filed after the decision of the Supreme Court of the State and after the Chief Justice of that court had allowed the appeal and had directed transmission here of a certified transcript of the record. We do not approve of that practice, where it does not appear that the stipulation has received the approval of the court, as we think that adherence to our rule as to the preparation of records is important for the protection of the court whose decision is under review as well as of this Court. See Rule 10. But as the question presented in this instance does not turn upon an appreciation of the facts on any disputed point, we turn to the merits.

The stipulation, after setting forth the charging part of the indictment, recites in substance the following: That on July 27, 1934, there

was held in Portland, a meeting which had been advertised by handbills issued by the Portland section of the Communist Party; that the number of persons in attendance was variously estimated at from 150 to 300; that some of those present, who were members of the Communist Party, estimated that not to exceed ten to fifteen per cent. of those in attendance were such members; that the meeting was open to the public without charge and no questions were asked of those entering, with respect to their relation to the Communist Party; that the notice of the meeting advertised it as a protest against illegal raids on workers' halls and homes and against the shooting of striking longshoremen by Portland police; that the chairman stated that it was a meeting held by the Communist Party; that the first speaker dwelt on the activities of the Young Communist League; that the defendant De Jonge, the second speaker, was a member of the Communist Party and went to the meeting to speak in its name; that in his talk he protested against conditions in the county jail, the action of city police in relation to the maritime strike then in progress in Portland and numerous other matters; that he discussed the reason for the raids on the Communist headquarters and workers' halls and offices; that he told the workers that these attacks were due to efforts on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break the strike by pitting the longshoremen and seamen against the Communist movement; that there was also testimony to the effect that defendant asked those present to do more work in obtaining members for the Communist Party and requested all to be at the meeting of the party to be held in Portland on the following evening and to bring their friends to show their defiance to local police authority and to assist them in their revolutionary tactics; that there was also testimony that defendant urged the purchase of certain communist literature which was sold at the meeting; that while the meeting was still in progress it was raided by the police; that the meeting was conducted in an orderly manner; that defendant and several others who were actively conducting the meeting were arrested by the police and that on searching the hall the police found a quantity of communist literature.

The stipulation then set forth various extracts from the literature of the Communist Party to show its advocacy of criminal syn-

dicalism. The stipulation does not disclose any activity by the defendant as a basis for his prosecution other than his participation in the meeting in question. Nor does the stipulation show that the communist literature distributed at the meeting contained any advocacy of criminal syndicalism or of any unlawful conduct. It was admitted by the Attorney General of the State in his argument at the bar of this Court that the literature distributed in the meeting was not of that sort and that the extracts contained in the stipulation were taken from communist literature found elsewhere. Its introduction in evidence was for the purpose of showing that the Communist Party as such did advocate the doctrine of criminal syndicalism, a fact which is not disputed on this appeal.

While the stipulation of facts is but a condensed statement, still much of it is irrelevant in the light of the particular charge of the indictment as construed by the Supreme Court. The indictment charged as follows:

"The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart on the 27th day of July, A. D., 1934, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct and assist in conducting an assemblage of persons, organization, society and group, to wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon".

On the theory that this was a charge that criminal syndicalism and sabotage were advocated at the meeting in question, defendant moved for acquittal insisting that the evidence was insufficient to warrant his conviction. The trial court denied his motion and error in this respect was assigned on appeal. The Supreme Court of the State put aside that contention by ruling that the indictment did not charge that criminal syndicalism or sabotage was advocated at the meeting described in the evidence, either by defendant or by anyone else. The words of the indictment that "said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage", referred not to the

meeting in question, or to anything then and there said or done by defendant or others, but to the advocacy of criminal syndicalism and sabotage by the Communist Party in Multnomah County. The ruling of the state court upon this point was precise. The court said (152 Ore. p. 330):

"Turning now to the grounds for a directed verdict set forth in defendant's motion therefor, we note that he asserts and argues that the indictment charges the assemblage at which he spoke with unlawfully and feloniously teaching and advocating the doctrine of criminal syndicalism and sabotage, and elsewhere in the same motion he contends that the indictment charges the defendant with unlawfully and feloniously teaching and advocating said doctrine at said meeting. The indictment does not, however, charge the defendant, nor the assemblage at which he spoke, with teaching or advocating at said meeting at 68 Southwest Alder street, in the city of Portland, the doctrine of criminal syndicalism or sabotage. What the indictment does charge, in plain and concise language, is that the defendant presided at, conducted and assisted in conducting an essemblage of persons, organization, society and group, to-wit, the Communist party, which said assemblage of persons, organization, society and group was unlawfully teaching and advocating in Multnomah county the doctrine of criminal syndicalism and sabotage."

In this view, lack of sufficient evidence as to illegal advocacy or action at the meeting became immaterial. Having limited the charge to defendant's participation in a meeting called by the Communist Party, the state court sustained the conviction upon that basis regardless of what was said or done at the meeting.

We must take the indictment as thus construed. Conviction upon a charge not made would be sheer denial of due process. It thus appears that, while defendant was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distributing its literature. He was not charged with teaching or advocating criminal syndicalism or sabotage or any unlawful acts, either at the meeting or elsewhere. He was accordingly deprived of the benefit of evidence as to the orderly and lawful conduct of the meeting and that it was not called or used for the advocacy of criminal syndicalism or sabotage or any unlawful action. His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.

The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member who "assisted in the conduct" of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney General made, and could not avoid, in the light of the decision of the state court. Thus if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party although held for the discussion of political issues or to adopt protests and pass resolutions of an entirely innocent and proper character.

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. In *Gitlow* v. *New York*, 268 U. S. 652, under the New York statute defining criminal anarchy, the defendant was found to be responsible for a "manifesto" advocating the overthrow of the government by violence and unlawful means. *Id.*, pp. 656, 662, 663. In *Whitney* v. *California*, 274 U. S. 357, under the California statute relating to criminal syndicalism, the defendant was found guilty of wilfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods.

The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes. *Id.*, pp. 363, 364, 367, 379. The case of *Burns* v. *United States*, 274 U. S. 328, involved a similar ruling under the California statute as extended to the Yosemite National Park. *Id.*, pp. 330, 331. On the other hand, in *Fiske* v. *Kansas*, 274 U. S. 380, the criminal syndicalism act of that State was held to have been applied unconstitutionally and the judgment of conviction was reversed, where it was not shown that unlawful methods had been advocated. *Id.*, p. 387. See, also, *Stromberg* v. *California*, 283 U. S. 359.

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. *Gitlow* v. *New York*, *supra*, p. 666; *Stromberg* v. *California*, *supra*, p. 368; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243, 244. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v. *Cruikshank*, 92 U. S. 542, 552: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances". The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. *Hebert* v. *Louisiana*, 272 U. S. 312, 316; *Powell* v. *Alabama*, 287 U. S. 45, 67; *Grosjean* v. *American Press Co.*, *supra*.

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve in-

violate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment. The judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.